

T R A C T S

ON THE

L I B E R T Y,

SPIRITUAL and TEMPORAL,

O F

SUBJECTS in *ENGLAND*.

ADDRESSED TO

J. N. Esq; at AIX-LA-CHAPELLE.

PART II.

BY

ANTHONY ELLYS, D. D.

Late Lord Bishop of St. DAVID's.

LONDON,

Printed for J. WHISTON and B. WHITE, in *Fleet-Street*; and S. HOOPER,
near the New Church in the *Strand*.

MDCCLXV.

T R A C T S

ON THE

L I B E R T Y

C O N I T E M P O R A R Y

O F

S U B J E C T S I N E N G L A N D

ADDRESSED TO

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J. N. B. AIX-LA-CHAPELLE

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A N T H O N Y F E L Y S D D

Of the Right Hon. Lord Bishop of St. David's



Printed for J. Whittaker and S. Hooper, Printers, and S. Hooper, Bookseller, in the Strand.

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S E C T. III.

T R A C T S
ON THE
LIBERTY,
SPIRITUAL and TEMPORAL,
OF
SUBJECTS in ENGLAND.

PART II.
OF TEMPORAL LIBERTY.

TRACT I.
*Of the Liberty of the Subjects in Judicial Proceedings, as to Matters
both Criminal and Civil.*

MANKIND are often so much influenced by their education, by custom and example, in their judgment of things, that I doubt not but we may meet with many persons, born and educated under absolute monarchy, who not only are easy under that kind of government, but prefer it to any other, even to those regal ones which have any limitation upon them. Several French writers have made no difficulty of publishing to the world their sentiments to this purpose [a].—And no doubt, as to secrecy, to a ready and effectual execution of their counsels, and to several other articles of great importance, an un-

[a] Bayle's *Response au provincial*, artic. *DE DESPOTISME*.—Ramsay's *Essai sur le Gouvernement*, p. 150, 151.

limited monarchy would be justly preferable to all other forms of government [b], because in free constitutions the forms of government must necessarily be more complicated and slow, so that in these the same secrecy cannot always be kept, nor the same dispatch made, nor the same steadiness of measures always pursued; and if men could be sure of having at all times wise and good princes, who would make a right use of their power, and would take care to have ministers of the like capacities and dispositions, the wiser part of mankind would always prefer an absolute monarchy before any other kind of government: but whoever hopes to see these things constantly, in the usual course of the world, will be, for the most part, disappointed. Human nature is so liable to be corrupted, that, when a prince can do whatever he wills, he is too apt to do that which he ought not.

If an absolute prince be sometimes good natured, he may forbear doing cruel or oppressive things, and make no breaches upon the liberty or property of his subjects: but, as Brutus said to Cæsar, “*Quid si nolit [c]?*” The very apprehension of this is sufficient to break a man’s spirit, or keep him under an insecurity inconsistent with happiness. It either cramps and stints him, as Longinus observes, or else it gives him such a secret uneasiness (on his own account, or that of his country) as is sufficient to take off the relish of all other enjoyments.

THE nobility of France (at least such as were so before they were enslaved) who, that they might domineer over others and serve a present turn, suffered the crown to usurp all the liberties of the people till they were quite mastered, were, at length, brought under the same tyrannical yoke with their inferiors: and, I believe, there are but few of the principal nobility of that nation, not excepting their great officers of state, who do not envy us here for

[b] “*L’Autorité absolue est le plus sur moyen de rendre un état florissant et redoutable à ses ennemis.*” *Test. polit. Mr. Louvois, part ii. p. 382.* “*L’Autorité limitée du souverain, et celle des républiques, ont plus des mauvaises cotes, et sont sujettes à plus des factieuses suites pour l’état, et pour le peuple, que n’est le pouvoir arbitraire.*” *Ibid. p. 383.*

[c] Tull. *Epist. ad Brutum, lib. ii.*

our freedom, and repine in private at the slavery which they groan under [d].

For these reasons, men, who have experienced, or observed from history, the mischiefs resulting from absolute monarchies, have sometimes gone into Aristocracies; and, when they were weary of them, at length even into Democracies; hoping that, when the people governed themselves, their interest would lead them to do it well. But both these forms have been found to be attended with great inconveniencies [e], so that in Greece, where they had those kind of governments with various limitations, the best writers in politics came to fix upon a limited monarchy, with a mixture of Aristocracy and Democracy, as the most expedient form [f]. And they had accordingly models of this sort in Crete, Lacedæmon, and other places.

THE northern nations also fixed upon this form, as the most expedient both for liberty and for conquest. But I will venture to affirm that neither among the antients, nor among the moderns, was there any government better formed upon a balance of its several parts, for producing and preserving the happiness of a nation, than that of England is at present. Some of the Gothic nations were, at first, upon models much like to that in our nation about the same time; but theirs soon began to be corrupted, and went on growing worse, while that of England, by the steps I shall hereafter observe, improved: so that in the time of our King Edward IV, that judicious and impartial writer, Le Sieur des Comines [g], preferred England to any other nation in point of government. And if this was true then, it is much more so now,

[d] Herodotus, in the person of Otanes, says, that “une autorité sans frein cor-
“rompt facilement l’homme le plus vertueux, et le dépouille de son meilleurs qua-
“lités.” Ramsay on Government, p. 96.

[e] Ramsay’s Essay on Civil Government; the Persian Grandees Arguments against Aristocracy and Democracy.

[f] Plato, in his Politicus, says, *Μοναρχία τυχεῖσα ἐν γράμμασιν, ἢς νόμος λέγο-
μεν, ἀρίστη πασῶν.*

[g] “Et selon mon avis, s’il y a entre toutes les seigneuries du monde, dont j’ai
“cognoissance, où la chose publique est mieux traitée, et où il y a moins de violence
“sur le peuple, c’est l’Angleterre.” Memoirs, lib. v. p. 413.

when the greatest inconveniencies are remedied, and the state of our liberty is much improved beyond what it was at that time. Mess. Boulainvilliers and Montesquieu make no difficulty of owning it, and so does Voltaire [b]; but that the reason for so doing may more clearly appear, I shall specify the principal branches of our civil liberty, as they stand at present, and occasionally note the great advantages we have over other nations, as well as over this nation itself in former times.

IN treating of the freedom of subjects in England, the thing that comes naturally first into view is, the security we have of not being long detained in prison (in case we be at any time committed to it) without just cause or due process of law. Our condition, in this respect, differs not a little to our advantage from those of most other subjects in Europe.

I NEED not inform the public how every one in France is liable to be treated, in case he falls under the displeasure of the court, about matters of state: without any charge made against him upon oath, or any examination taken of him by a magistrate, an order or writ under the signet royal is sufficient to cause him, whatever his rank or quality is, to be not only arrested, but carried instantly away to any prison in the kingdom, and there to be kept in the closest confinement, without any means of procuring his liberty, as long as the court shall think fit to deny it: however able he might be to give such proofs of his innocence, as would be satisfactory to impartial judges, if his friends, or agents, were allowed to come to him, or he had the use of his papers and knowledge of his accusers. He may be incapable of doing this when secluded from all correspondence, and when he is not so much as examined at all. At this rate, he may continue for a number of years in doleful solitude, to the great impairment of his health, and disorder of his estate: and if at last he gets out, he has no remedy; no action of false imprisonment, or damages. The ministers, by whose procurement perhaps he was imprisoned, are safe under the

[b] "Il me semble à moi que, s'il y a un gouvernement, dont on pourroit de nos jours proposer pour modele la sagesse, c'est celui d'Angleterre. Là le parlement est l'arbitre du peuple, et du roi; et le roi a tout le pouvoir de faire du bien, mais il n'en a point pour faire du mal." Voltaire, *Antimachiavel*, p. 222.

royal prerogative. Now what opportunity, and what temptation, this may give to ill ministers to proceed thus against persons, with whom they are displeased, may be easily conceived; and in fact how often it hath done so, the histories of France afford us so many examples, that I need not quote any particular ones.

It may be more material to observe, that the nobility and parliaments of that kingdom, very sensible of the hardships which an abuse of this power has brought upon them, have, at different times, made remonstrances against it [i]. In the beginning of the reign of Lewis IX, about A. D. 1226, the greatest part of the nobility requested Queen Blanch, who was mother and guardian to that prince, "That, according to the custom of France, against the
" time of his coronation, all persons in prison, especially the
" counts of Flanders and Boulogne, should be discharged, who, in
" violation of the liberties of the kingdom, had been kept under close
" confinement for twelve years together." The queen soon after, in an assembly of the states, set free these imprisoned lords [k]. But her doing it availed little towards the liberty of the subjects; for the practice of imprisoning men at the will of the court went on as before. The Cardinal de Retz [l] tells us, that by an ancient ordinance made by some of the kings of France at the request of the states of that kingdom, it was provided that no one in it should be kept in prison above three days without being examined by proper authority; and the parliament of Paris, in its contests with the court in 1648, made a new declaration to that purpose, which the court was at that time obliged to allow. But it produced very little effect, for the court, after it had gained its point upon the parliament, still practised as it did before: it imprisoned men on what occasions, and for what times, it pleased, without allowing

[i] Matt. Paris in Hen. III, edit. Lond. 1640. p. 335. C. De Boulainvilliers, *Etat de la France*, tom. iii. p. 332. and the same of the ancient parliaments of France.

[k] Count Boulainvilliers, *Parliament of France*, p. 58. says, that only the count of Flanders was set at liberty, and that he was forced to pay a large sum for it, towards the charge of the king's inauguration.

[l] Tom. i. p. 161 & 164. edit. Amsterdam, 1719.

them any trial, which practice it continues to this day: as does also the court of Spain, and all other absolute princes in Europe.

THERE have been times when this same power has been claimed, and with the like rigour exercised, by the kings of England; not that there was any just ground in law for it; for the antient Saxon constitution allowed men to be bailed in all cases. By the common law, anciently, says Lord Coke [m], a man accused or indicted of high treason, or of any felony whatsoever, was bailable upon good security; so that the gaol was only his pledge and surety who could find no other: for the law of England, says the same learned author, is a law of mercy, that the innocent shall not be worn or wasted by long imprisonment, but speedily come to his trial, and that prisoners for criminal causes be humanely dealt withal.

BUT after the Norman conquest it was provided, that, not only in the case of homicide and high treason, but in most other criminal causes, the offender was not bailable [n]. And even when innocent persons were committed and detained in prison, they were obliged to sue out writs, *De odio et atia*, from the court of Chancery for their relief [o]. Several of our kings after this æra had little regard to the part of the common law, but, on the slightest pretences, or unjust suspicions, imprisoned men of all ranks, and kept them in confinement as long as they pleased. We are told, for instance, by Roger Hoveden, that, among the persons who were set at liberty upon Richard the First's accession to the throne, "there were all such as had been taken and kept in prison "at the will of the king, or that of his justice, who were not "fined pursuant to a legal proceeding by the county or hundred, "or by appeal;" which passage manifestly implies that there were considerable numbers of persons in that condition. The same kind of tyranny was practised by the ministers of King

[m] Coke's 2d Inst. p. 189.

[n] Ibid. p. 42. 186.

[o] See an account of the writs *De odio et atia*, in Bacon's Government of England, par. I. p. 168. By the ancient law of the land, villains might be imprisoned by their lords without cause. Cotton's Posth. 224.

Henry II, John, &c. and even the Barons, in King Edward the First's time, were very desirous of having the same power to imprison persons at their will, for trespasses done in their parks and ponds; but the king would not grant it [q].

In opposition to these practices, the great charter of 9 Henry III, provided "that no freeman should be taken or imprisoned. Neither (says the king [r]) will we go or send upon him, unless "by the legal judgment of his peers, or by the law of the land." But how solemn soever this charter was granted and confirmed, yet in a little time there were frequent breaches upon it, which plainly appears from a speech made in parliament, by the archbishop of Canterbury, 18 Edward I [s]. Among other grievances, he represented "that very many freemen of the kingdom, had, "without any guilt on their part, been committed by the king's "ministers, to divers prisons, as if they had been slaves of the "meanest degree, therein to be kept. Of whom some died in "prison with hunger, or grief, and the weight of their chains. "From others they extorted at their pleasure infinite sums of "money for their ransoms [t]." This speech, with the notoriety of the facts, had such an influence upon the parliament that they inflicted severe punishments upon some of the ministers and others.

THIS interposition of the parliament kept the ministry in order for some time; but in Edward the Third's time the like practices began again, and many breaches were made upon the liberty of the subject; but so concerned was the nation to preserve this great blessing, and so vigorously did the parliament enforce their remonstrances to that prince, that a new act was gained in confirmation of it. For, in the fifth year of the reign of Edward III, ch. 9. it was enacted, "That no man from henceforth shall be attached "by any accusation, nor forejudged of his life or limb, nor his "lands, tenements, goods nor chattels, seized into the king's hands,

[q] See Stat. Merton.

[r] "Nullus liber homo capiatur, vel imprisonetur—nec super eum ibimus, nec "super eum mittemus, nisi per legale iudicium parium suorum, aut per legem terræ." Mag. Char. Coke's 2d Institut. p. 45.

[s] See Echard's Hist. vol. I. p. 309.

[t] Petyt, Misc. Parliament. Lond. 1680, in the Appendix.

“ against the form of the great charter, and the law of the land.” And again in the twenty-fifth year of the same reign, there was another act made more full and expressive; for it says, “ That from henceforth none shall be taken by petition or suggestion, made to our lord the king or to his council, unless it be by indictment or presentment of his good and lawful people of the same neighbourhood where such deeds be done, in due manner, or by process made by writ original at the common law: and that if any thing be done against the same it shall be holden for none [u].” Again, in the twenty-eighth of this reign, it is enacted, “ That no man, of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law [w].” Also in 38 Edward III, ch. 18. it is enacted, that, when suggestions are made by any persons against others, the former shall find sureties before the king’s grand council “ to pursue their suggestions, and incur the same pain that the other should have had if he were attainted, in case their suggestions be found evil; and that then the process of law be made against them without being taken and imprisoned against the form of the said charter and other statutes [x].” And yet again 42 Edward III, ch. 3. “ at the request of the commons, by their petitions put forth in this parliament, to

[u] Sir Robert Cotton, *Polth.* p. 227. says, that this law was made upon the commitment of divers persons to the Tower, no man yet knoweth for what.

[w] See 3d Bulstrode 47. Hales’s *Hist. P. C.* ch. 13. b. ii. p. 105. says, that regularly all courts and persons that have judicial power, by the common or statute law, for the conservation of the peace, have power to grant warrants for arresting of felons.

[x] Hales, in his *Observations on Magna Charta*, and the several Statutes of Edward III here quoted, says, that the question will be, What is the law of the land? For, if these preparatory arrests of felons be not against the law of the land, then they are not restrained by these statutes: and he delivers it as his opinion, that imprisonment before indictment is surely lawful, and not within the restraint of Magna Charta; and if so, then surely arrest is much more lawful, for it is but to bring persons to an examination, in order to their commitment, bail, or discharge; and there is no greater record of their commitment than of their arrest. *Hist. P. C.* ch. 13. b. ii. p. 109.

“eschew”

“eschew the mischiefs and damages done to divers of his com-
 “moners, by false accusers, which oftentimes have made their
 “accusations more for revenge and singular benefit than for the
 “profit of the king or of his people; which accused persons some
 “have been taken, and sometime caused to come before the king’s
 “council by writ, and otherwise, upon grievous pain against the
 “law; it is assented and accorded, for the good governance of the
 “commons, that no man be put to answer without presentment
 “before justices, or matter of record, or by due process and writ
 “original, according to the old law of the land; and if any thing
 “from henceforth be done to the contrary, it shall be void in the
 “law, and holden for error.”

ONE would think that here had been laws enough to secure this point of liberty, and, indeed, we find hardly any more complaints about grievances of this kind for some succeeding reigns; but, after the civil wars between the houses of York and Lancaster, there was an act of parliament passed that justices of peace should have power to determine the validity of indictments [y]. In virtue of which Empson and Dudley proceeded: “Their manner
 “was to cause divers subjects to be indicted of sundry crimes, and
 “so far forth to proceed in form of law; but when the bills were
 “found, to commit them, and nevertheless not to produce them in
 “any reasonable time to their answers, but to suffer them to lan-
 “guish long in prison, and by sundry artfull devices and terrors
 “to extort from them great fines and ransoms, which they termed
 “compositions and mitigations [z].” The high-commissioned ec-
 clesiastical court, erected in the reigns of Edward VI and Elizabeth, to enquire of, and provide against, papists and heretics, had a power to fine and imprison them: which was accordingly practised in many cases [a].

[y] See the act 11 Henry VII, ch. 3. which is not in the statute books, but in Coke’s 4th Inst. p. 41.

[z] Petyt, Misc. Parl. p. 208.

[a] See Coll. Eccles. Hist.

C

BUT

BUT great complaint was made, in the latter of those reigns, by all the judges, and the barons of the exchequer, "That divers persons were committed, at several times, to several prisons, without good cause: and, upon writs issued out of the courts of law for their discharge, they have been again imprisoned, by some noblemen and counsellors, in secret prisons, or lawful office, so that the courts did not know whither to direct their writs for their relief; and serjeants and others of the courts have been imprisoned for executing such writs: and though after upon these the judges had declared under their hands against such practices as illegal; and that the cause of commitment ought to be specified in any warrant from the queen and council, there did follow in that reign more quietness than before [b]."

Yet still the same claim was continued, and carried into execution, on the part of the crown, and the judges did not continue to oppose it, or not with any effect; for in King James the First's reign, Sir W. Rawleigh represented a justice of peace, and committed men with impunity: at last, the judges came to maintain, in Westminster-hall, that the crown and its ministers might lawfully imprison and detain men in custody, in several cases, which before were disallowed. For judge Doderidge says [c], "That the king may, by his absolute power, commit a nobleman to prison, *durante beneplacito suo*, from whence he cannot be discharged by bail or mainprize, nor by the common writ *de homine replegiando*. And by the same power it is, if a nobleman be committed to prison by the king's council, for they are incorporate to his highness, and do command as with the king's mouth." And in 3 Carol. I, term Michaelmas, Lord Chief Justice Hyde, Justice Jones, Doderidge, and Whitlock declared, by the mouth of the Lord Chief Justice, their unanimous opinion, that Sir John Corbett and others, who had been brought into the King's Bench, by the warden of the Fleet, and the cause of their commitment and detention shewn to be *per speciale mandatum*

[A] Lord Chief Justice Anderson's Reports, p. 297. in the Mid. Temp. Libr.

[c] Treatises of the Nobility, p. 159. edit. Lond. 1658.

“*domini regis*, without assigning any other cause, ought not to be bailed, but remanded to prison [d].”

Therefore, in vindicating this great point of liberty, the lords spiritual and temporal, and the commons of England, in parliament assembled, in 1627, 3 Carol. I. by their joint petition to that prince, declared and requested, as their birth-right, that no free-man should be taken or imprisoned, or be out-lawed or exiled, or in any manner be destroyed, nor disinherited, nor put to death, without being brought to answer by due process of law [e]. To which the king answered, without any saving of the rights of the crown, *Soit droit fait comme il est désiré* [f]. And afterwards we are informed that this bill of rights passed into an act [g].

BUT as there were afterwards several illegal commitments and imprisonments, during the course of this reign, and the following usurpation, and in the next reign there was a great disposition in the ministers to extend the royal prerogative; and as sheriffs, gaolers, &c. often used oppressive delays, even on frivolous excuses, which were very expensive to prisoners, before they would make returns to the writs issued out for their relief, it was therefore at last found necessary to settle this matter once for all, in the noted statute of 31 Carol. II, called the act of *Habeas Corpus*. Wherein it is provided that, in the case of any person not imprisoned for treason or felony, specially expressed in the warrant for his commitment, if a writ of *Habeas Corpus* shall be brought on his behalf to the sheriff or gaoler, and due security given for paying the charge of bringing, and, if need be, carrying back the prisoner, and for his not making an escape, that then he shall, within three days after the service of the writ, be brought before the lord chancellor, or the judges of that court from whence the writ shall issue; and the true cause of his imprisonment shall to them be certified, unless he be committed in any place above twenty miles distant from the place where such court or person is: and if it be beyond twenty miles, and not above a hundred miles, then he is to

[d] State Trials, vol. vii. p. 140.

[e] English Liber. p. 180.

[f] Ibid. p. 185.

[g] See the Bill of Rights in Rapin, 1627.

be brought within twenty days at furthest. And if the commitment be made out of term time, application may be made, on the prisoner's behalf, to the lord chancellor, lord keeper, or any of the king's justices or barons, of the degree of the coif; and the said lord chancellor, judge, or baron, upon viewing a copy of their commitment, or upon oath made that a copy of it was denied, shall grant a writ of *Habeas Corpus*, under the seal of the court where he is a judge. Upon which writ directed to the gaoler, and returnable immediately before the said judge, or any other judge of any of the said courts, the keeper of the prison shall, within the times before expressed, bring the prisoner before the lord chancellor, or some one of the judges, with the true causes of his detainer. And thereupon the said chancellor or judge, unless it appears that the commitment is for a matter in which bail is not allowed by law, shall discharge the said prisoner from his imprisonment, upon his recognizance with one or more competent sureties, for his appearance at the king's bench the term following, or at the next assizes, or gaol delivery, of the county, city, or place, where the commitment was made, and shall certify the said writ, with the return thereof, and the recognizance into the said court where the appearance is to be made. Provided that the prisoner hath not wilfully neglected, by the space of two whole terms after his imprisonment, to pray an *Habeas Corpus* for his enlargement; for, in case of such neglect, he shall not have any *Habeas Corpus* granted in vacation time. If any keeper shall neglect or refuse to make such returns, or to bring the bodies of the prisoners within the time before specified, or shall refuse to deliver, within six hours after demand, to the prisoner, or any person applying on his behalf, a true copy of the warrant of commitment, he shall forfeit, for the first offence, to the party grieved 100 *l.* for the second offence 200 *l.* and shall also be incapable of holding his office any longer. If any prisoner, discharged by virtue of this act, shall be recommitted by any one, that latter person who has made the fresh commitment, or any one who knowingly aids him in it, shall forfeit to the party grieved 500 *l.* In case that
a prisoner,

a prisoner, who is committed for high-treason or felony, plainly or specially expressed, shall in open court, in the first week of the term, pray to be brought to his trial, and yet shall not be indicted some time in the next term, or sessions of Oyer and Terminer, the judges, upon motion made to them in open court the last day of the term, are obliged to set him at liberty upon bail [b]; unless it appears upon oath that the king's witnesses could not be produced in the same term: and if he shall not be indicted and tried the second term, he shall be discharged from his imprisonment. No prisoner shall be removed from one prison or custody to another, without an *Habeas Corpus*, or some other legal writ or warrant, except in case of fire, infection, or other necessity. If any person signs, or acts under, a warrant for removing a prisoner contrary to this act, he is liable to the pains and forfeitures above mentioned. If the lord chancellor, or any of the judges, shall refuse to grant a writ of *Habeas Corpus*, upon due application, they shall forfeit 500 *l.* to the party grieved. No subject of this realm, and inhabitant in the same, shall be sent prisoner into Scotland, or into any place beyond the seas. If he be, he shall have an action of false imprisonment against all persons concerned in it, of whom he shall recover treble costs besides damages, which last shall not be less than 500 *l.* And every person who shall make or sign a warrant for such imprisonment, and be lawfully convicted thereof, shall be henceforth disabled to bear any office of trust or profit in this kingdom; shall incur a *præmunire*; and be incapable of any pardon from the king, his heirs, or successors.

By these provisions, effectual care is taken that no man shall be too long kept in prison: he must soon be brought to his trial, which is what every innocent man under suspicion should earnestly desire. In the mean while, it is one circumstance of no small advantage, that the certainty of a man's being soon brought to trial, or even a probability of being at any time brought before the court by *Habeas Corpus*, in a great measure prevents ill usage in prison.

[b] And bail in this and all other cases ought not to be excessive; see the statute of 1 William and Mary.

I mean

I mean the suffering such hardships or violences as are frequently in the prisons of other countries; and were so formerly in those of our own.

MONSIEUR de Comines, speaking of Lewis XI of France, says, "That he caused several cruel prisons to be made, some of iron, and some of wood; but covered with iron plates both within and without, with terrible cages about eight foot wide, and seven foot high. In one of which, this author tells us that, he himself was imprisoned, for eight months together, under Charles the Eighth, and had reason to curse the inventor of them [i]." These were things of an uncommon sort; but from Kenneville's history of the Bastile, we find that, in that and other of the usual prisons in France, there were very great hardships frequently put upon the prisoners; particularly locking their feet in a most diabolical ring, with a thick heavy chain, and a great globe of iron unreasonably weighty, which engines were called the king's nets. "Nevertheless," says that author, "I have seen many eminent men, for the most trivial offences against the court, in these prisons, with these nets about their legs [k]." And it may easily be conceived, that men of such dispositions as keepers of prisons often are, may vex and outrage their prisoners, when they know it will not be disagreeable to their superiors, or when it will serve to gratify their own ill passions, especially when they know the abused prisoners can have no opportunity of complaining.

IN England, Bracton says [l], it has been an ancient maxim of our law that the prison is for custody, not for punishment. And another author says [m], "And because it is forbidden that none be pained before judgment, the law requireth that none be put to terrors, nor in any horrible or dangerous place; but it is lawful for gaolers to fetter those they doubt, so as the fetters weigh not more than twelve ounces."

BUT notwithstanding this, we have had instances, in our own history, of great cruelties and hardships exercised upon persons in prison. King John caused Geoffry Arch-deacon of Norwich to

[i] Mem. b. vi. p. 401. Eng. edit.

[k] Fleta, lib. i. cap. 26. p. 39.

[l] Lib. iii. cap. 6. fol. 105.

[m] Mirror. Fr. edit. p. 130. chap. ii. sect. 9.

be imprisoned, and put in bonds, and, in a few days, a leaden cope to be put upon him; with the pressure of which, and for want of victuals, he soon died [a]. In Richard the Second's reign, an Irish monk, having accused the duke of Lancaster, and being imprisoned in order to make good his charge, was, by the duke's procurement, cruelly murdered. In this time likewise the duke of Gloucester was killed in a prison at Calais. And these cruelties were practised, not only at the command of the kings and their ministers, but even the gaolers have been audacious enough to make a practice of putting great hardships upon their prisoners, in order to make them become appellors, *i. e.* to accuse other persons of certain crimes, by which means the gaolers would come to have the custody of them, and profits of their goods. It is therefore provided by 1 Edward III. ch. 7. that the justices of assize shall enquire into such compulsions, punishments, and torments. Again 14 Edward III. ch. 10. in order to prevent such practices, it is enacted, that the sheriffs should have the custody of the gaols, and should put in such under-keepers for whom they will answer. And for any keeper to make a prisoner, whom he hath in his ward, to become an appellor against his will, is felony. Bracton says [b], "*Solent praesides in carcere continendos damnare, ut in vinculis contineantur; sed hujusmodi interdicta sunt a lege, quia carcer ad continendos, non ad puniendos, haberi debet.*" Therefore saith Lord Coke [c], every imprisonment is taken and deemed in law Durtia, dureffe. A little addition to it by the goaler is too great dureffe. And *ibid.* if the goaler keeps the prisoner more streightly than he ought of right, whereof the prisoner dieth, this is felony in the goaler by common law. And this is the cause why, if a prisoner dies in prison, the coroner ought to sit upon him, and, by verdict of twelve jurors, determine whether any foul means had been used in order to bring him to his death.

A MAN therefore is safe, during his being in custody; and, when his trial is to come on, he hath the great advantage of being tried

[a] Brad. Hist. England, p. 480.

[b] Lib. iii. cap. 6. fol. 154.

[c] 3d Inst. p. 91.

by his country, that is, by men of the same order and condition with himself. For first, the bill of indictment, against him, must be found by the grand jury, consisting of twelve or more gentlemen, or freemen, of substance and credit, in the county where the fact is supposed to have been committed [q]; who, being sworn to make true presentment, upon examining witnesses, or weighing other proofs that may have come to their knowledge, are either to allow or reject the indictment, as true or false: in doing which at least twelve of them must agree together [r]. Unless they do this, the party indicted cannot be put upon his trial by the petty jury [s]. Now this is of great advantage, in order to prevent an innocent person's life or reputation from being brought any further into hazard, if they do not find the bill; which it cannot be on that same indictment. It is enacted by 23 Edward I. called *Articuli super charta*, cap. 9. that the sheriffs shall put into inquests and juries such as be next neighbours, most sufficient, and least suspicious. And by 23 Edward III. ch. 6. that justices of assizes shall have commissions sufficient to enquire of sheriffs for putting into pannels jurors suspect and of evil fame. It is further enacted by 34 Edward III. that all pannels shall be made of the next neighbours, which shall not be suspected nor procured. And that the ministers who act contrary thereto shall be punished before the justices who take the inquest. But the principal statutes which relate to the return of grand juries are the 11 Henry IV. ch. 9. and 3 Henry VIII. ch. 12. The former of which, reciting that persons not guilty had been indicted by conspiracy, abetment, &c. enacts, that no indictment be made from henceforth but by inquest

[q] Hawk. p. c. 1p. 213. b. ii.

[r] During the old Saxon constitution, indictments might be made by any one legal person. See Bacon, p. i. p. 54. but afterwards in order to prevent persons being unduly slandered, and put upon trial for their lives, the Mirror says, that Henry I. ordained, that no man should be tried without an indictment made by twelve persons.

[s] By 25 Edward III. and 42 Edward III. it is enacted, that, for preventing mischief done by false accusers, none shall be put to answer unless it be by indictment of good and lawful people of the same neighbourhood where such deeds be done: English Liber, p. 254. See *ibid.* p. 255. and 258. the duty and power of the grand jury,

of the king's lawful liege people, returned by the sheriffs, without any denomination to the sheriff, made by any person, of the names which by him should be impaneled. The latter of these statutes, having recited, "That many oppressions had been by the untrue demeanor of sheriffs, and their ministers, done to great numbers of the king's subjects, by means of returning the names of such persons as, for the singular advantage of the sheriffs and their ministers, would be willfully foresworn; by reason whereof many substantial persons, the king's true subjects, had been wrongfully indicted of divers felonies, and other misbehaviour, by their notorious falsehoods." It is thereupon enacted that all pannels to be returned, which be not at the particular suit of any party, shall be reformed by putting to, and taking out, the names which so be impaneled by every sheriff and their ministers, by the discretion of the said justices before whom the pannels shall be returned [1]. By which provisions, sufficient care is taken that the grand juries shall consist of persons fit for that trust.

It is true, that in cases of misdemeanors, &c. which do not affect the life of the party, though the prosecution be only on the part of the crown, that there is no necessity for an indictment to be found against him by a grand jury: it is sufficient that an information be made by the attorney general, or some other persons, in the crown office; who are often the more careful about the interest of the parties informed against, because they are sensible of the disadvantage they lie under in not having their cause first considered by a grand jury.

It has been frequently alledged, that informations began in the reign of Henry VII, and are new things with respect to indictments, and lay the subject open to great grievances. But it is very clear that all the old statutes enact that proceedings shall be by presentment or indictment, and an information, filed in the crown

[1] Formerly grand juries were returned by the sheriffs, at the suit of the crown; from whence great mischiefs and inconveniencies arose to the people, by false indictments, &c. Hawk. P. Crown, b. ii. p. 218. by 7 William III. ch. 9. indictments for treason must be made within three years after the crime was committed, except in the cases therein mentioned.

D. office,

office, is no more than a presentment; and persons informed against are not now, as they were formerly in the Star-chamber, liable to be condemned by a number of officers of the crown: they must be tried by a petty jury. I must add, that this advantage of having their case in capital matters first determined by a grand jury, belongs to peers in like manner as to commoners, unless in cases of an impeachment by the house of commons, which, representing the whole people of England, is considered as a grand inquest, and therefore there is no other in such impeachments for either peer or commoner.

AND when the bill of indictment has been found by the grand jury, there still remains, as I have already observed, another and more exact trial; in which the nobility, in all cases of treason, misprision of treason, felony, or misprision of felony [*u*], are tried by their peers; that is by those who have a seat and vote in the house of lords; and who, on account of their common honour, &c. will be disposed to shew all the equity and regard that can reasonably be desired. More especially this may be relied upon now, when the whole body of the nobility have a right to assist in the trial of each peer; the case might possibly have been different formerly, when the lord high steward, an officer appointed by the crown, had a right to appoint any of the peers who were thought most fit for the purpose, provided that there were above twelve in number; of whom a majority was sufficient to acquit or condemn. For then it might be possible to pitch upon such as were known to have some resentment or prejudice to the person accused, or to his cause, or be under the prejudice of party, which, even imperceptibly to the persons themselves, may warp the judgment [*w*]. And this was

[*u*] In Lord Vaux's Case, Flemming chief justice said, that at the common law, in these four cases only a peer is to be tried by his peers: vid. Treason, felony, misprision of treason, and misprision of felony. See Bulstrode, p. 198.

[*w*] Cardinal Wolsey seems to have made an ill use of this power against the duke of Buckingham; for Rapin says, that though all the peers of the realm had a right to assist at the trial, there were present only one duke, one marquis, seven earls, and twelve barons; and it was generally believed that the cardinal had procured the majority against the duke. Hist. Eng. vol. I. p. 748. And the same author observes, that at the trial of Anna Bullen, though there were then fifty-eight peers in England, yet only twenty-nine assisted at the judgment.

the

the more practicable, because the person accused could not challenge or set aside any of his peers.

THIS last circumstance indeed continues at present; but now, by 7 William III. cap. 3. sect. 10. when a peer or peers is to be tried, the whole body of the peers have a right to be summoned, with twenty days notice, and, if they think fit, to sit and vote in the trial of each peer; and there must be a majority of those who are present either to condemn, or to acquit. To this trial by their peers every peer and peers of Great Britain has a right, except only in the cases of appeals of murder and of *præmunire*, in which cases they are to be tried by a jury of commoners.

COMMONERS in like manner are to be tried by a jury of their own rank; that is under the degree of peerage, but they must have all the following qualifications. First, They must be free and reputable subjects of England, not aliens, nor persons outlawed or attained of any crime; nor infamous by having suffered the pillory or the like: but men of honest characters, and in the eye of the law good subjects, *probi et legales homines*. Secondly, They must be men of competent substance and ability. Their qualification, by 13 Edward I, was forty shillings per ann. estate; which was encreased to four pound per ann. by 27 Elizabeth, cap. 6. excepting, by 23 Henry VIII. cap. 13. trials of felons in corporations may be by freemen worth only forty pound in goods. But by 4 and 5 William III. ch. 9. all jurors in England, returned for trials of issues joined, or for any capital offence by 3 George II. ch. 8. s. 2. must have in their own name, or in trust for them, within the same county, ten pound per ann. of freehold or copyhold lands, or lands in antient demesne; and leaseholders of twenty pounds per ann. (besides the reserved rent upon the lease) whose leases run for five hundred years, or for one or more life or lives, are capable of being on juries. In London those that have lands, tenements, or personal estate, to the value of one hundred pounds; and by 4 George II. ch. 7. leaseholders in Middlesex must have improved rents to the amount of fifty pounds per ann. or more, to qualify them to sit on juries. Other cities, boroughs, and towns corporate are excepted from these acts, and the practice in them is

to be according to custom. Jurymen in England must have five pounds per ann. and in Wales three pounds per ann. If they have less, it is a just cause of challenge. Thirdly, They must be of the same county wherein the fact was committed [x]. By 33 Henry VIII. ch. 23. indeed it was enacted that if a person examined, by any three or more of the king's council, confesses himself to be guilty of treason, misprision of treason, or murder, or be by them vehemently suspected to be guilty; that then the king, by commission under the great seal, may appoint persons to try such offences in the places limited by their commissions, by good and lawful men returned by the proper officer, in whatsoever other shire, or place, such offence was committed. And in this case no challenge for the county or hundred shall be allowed. But this statute, as far as it relates to treason within the realm, was repealed by 1 and 2 Philip and Mary, ch. 10. But, as to murder and misprision of treason, is thought to be still in force [y]. But such extraordinary commissions are seldom granted by the crown. Cases of murder are generally tried in the counties where the facts are committed, and by juries of the same. Now this must certainly be a very advantageous circumstance; in regard that neighbours may be most likely to know the truth of facts, and most likely to have a tender regard to the welfare of the party accused. Fourthly, They must be impartial, i. e. not biased by any affection or prejudice.

In order to prevent their being so, the law gives the party accused a liberty of making a challenge or exception both to the

[x] Lord Coke relates the innumerable mischiefs and horrible vexations which arose when this ancient and fundamental law was laid aside, in many cases, by the 11 Henry VII. ch. 3. and a liberty given to proceed without any indictment or presentment, by the verdict of twelve men, upon a bare information for the king; although the justices of assize and justices of peace were intrusted in it, to proceed according to their discretions upon bare proof by witnesses. See Coke's 4th Inst. p. 41. Though this liberty was given by act of parliament, yet the nation would not bear it, but was restless till that abominable act was repealed by the act 1 Henry VIII. cap. 6. and the trials by juries were thereby restored again. Sir Robert Atkins on Chancery, p. 32.

[y] Hawk. P. Crown, p. 404. b. ii.

array and to the polls [z]. A challenge to the array means an exception to the whole pannel, or list of jurors, in general, on account that the sheriff, or officer, who makes it, is of kin to one of the parties, or has made the pannel, or any part of it, upon the nomination of the party or his friends, or with a view to serve him, &c. In these or the like cases, the coroner is to make the pannel, or, if the coroner be also exceptionable, the court will order certain elisors to do it. In which last case no challenge can be made against the array [a]. But still there may be against the polls, *i. e.* against many persons who are put upon the pannel to be jurors. If ought can be alledged against any of these, that may give reasonable ground to suspect they are influenced either by affection, or by prejudice, the party, upon his trial, may alledge it as an exception, and, upon making it appear, that person excepted against will not be allowed to remain upon the jury. And besides these challenges, which the law allows to be made to the sheriff, or jurors, it further gives liberty to the party accused, in cases of high and petit treason, to challenge thirty-five, *i. e.* within one of three whole juries, without assigning any cause at all. And in like manner, in cases of felony, to challenge twenty, without shewing any cause. This it does, because there may possibly be instances when the party accused may know, or believe, some persons impannelled to have an ill will to him, and yet not be able to make it appear sufficiently to the court; and therefore, that all possible fairness may be used, and tenderness shewn, to the party accused, he is allowed to challenge the abovementioned numbers peremptorily, or without assigning any reason. By which means, it can hardly be that any of his known or suspected enemies can remain among the jurors. By this liberty of challenging, as I have observed, both the array and the polls, a man will generally be secure of an impartial and indifferent jury.

In this point therefore it may be justly remarked that we have an advantage which the subjects of some of the most famous re-

[z] Challenges to the poll, for cause, are many. They are gathered together by Lord Coke on Lyttelton, sect. 234.

[a] Jacob's Law Dict. voc. CHALL.

publics of antiquity had not, even when they were at the height of their freedom [b]. “At Carthage, the order of judges had a very great power, chiefly because the same persons were perpetually in that charge. The estates, the reputation, and the lives, of all men were at their disposal; and they did not use this excessive power with moderation.” In Rome, as there were different orders of men, so when one of these orders, *i. e.* the knights, got the judicial power appropriated to themselves, they treated the others very unjustly. “The knights having, by the laws of Gracchus, got the power of judicature, proceeded cruelly against many of the most eminent and innocent persons: particularly they condemned Pub. Rutilius, the most excellent person not only of his own, but of any other age, under the pretence of bribery, to the great grief of the whole city [c].” This was one of the greatest imperfections in the Roman republic: but the senators, and the knights, were much worse treated afterwards, when the emperors became absolute. Juvenal says,
 “Quo cecidit sub crimine? quisnam
 “Delator? quibus judiciis, quo teste probavit?
 “Nil horum; verbosa et grandis epistola venit
 “A Capreis [d].”

In the Gothic constitutions, a remedy was wisely provided against suffering any hardships of this kind: by the appointment that every person should be judged by his peers. This was anciently so, even in France, as a very learned author says [e], and very much approves it: “Our ancestors,” says he, “had great reason to desire to be judged by their peers.” Mezeray says the same things. “The great men were called princes; and we may perceive, in the darkness of those times, that it was not in the power of the king to deprive them of their estates, or to put them to death, but by certain forms, and with the judgment of their peers and equals, in which judgment he presided, or by the judgment of the general assemblies [f].” But ’tis a long time since this constitution hath been over-ruled by the court of France

[b] Livy, lib. xxxiii. cap. 46.

[d] Juv. Sat. x. p. 67.

[f] Mezeray, Abr. tom. i. p. 183.

[c] Velleius Paterc. lib. ii.

[e] C. Boullainvill. tom. i. p. 26.

whenever

whenever it has thought fit; it does not allow the peers of France, or even the princes of the blood, to be tried by the parliament at large, but by commissioners appointed by the king for that purpose [g]. And what view the court had in so doing, was intimated in a smart answer made to Francis I. when that prince expressed some wonder how the *Sieur Montaigne* came to be condemned, since his case was so good as that he had afterwards ample justice done to his memory. "The process of the *Sieur Montaigne*," says one who stood by, "was not made by judges, but only by commissioners:" as if he would say, in his blunt language, that such commissioners, appointed at the pleasure of a minister, who was then in the height of his power, were not so conscientious in their judgments as other good judges usually are. And indeed the case of *Grandier*, in the reign of *Lewis XIII.*, was a remarkable instance how commissioners may be chosen, by a prime minister, for the ruin of the party accused. This person having drawn upon himself the resentment of *Cardinal de Richelieu*, that minister ordered him to be tried upon an accusation of bewitching the nuns of *Loudon*. Commissioners were appointed by royal letters patents for that purpose, "Tous veritablement gens de bien [b], mais tous
" personnes credules, et par cette raison de credulité tous choisis par
" les ennemis de *Grandier*." Mr. Bayle, in his notes, says, "La re-
" marque que Mr. Menage fait sur cela me paroît digne d'être copiée.
" Il est à remarquer, dit il, qu'il n'y a point d'innocence à l'épreuve
" des juges, qu'on donne la choix des juges à l'accusateur, il fera
" bruler par des juges Molinistes, tous les Evêques Jansenistes,
" et par les juges Jansenistes tous les Evêques Molinistes." (l. xviii. d'Aout). These judges, "sur le deposition d'Astorothe diable de
" l'ordre des seraphins, et d'autres diables; c'est à dire, sur le
" deposition des religieuses qui se disoient possédées par ces
" demons," gave sentence that *Grandier* should be burnt alive; which was afterwards put into execution. Bayle adds that,

[g] The prince of Condé was tried by commissioners in Francis the Second's time; and the Guises, who then ruled all, would have caused the sentence to be put in execution, if Francis had not died unexpectedly.

[b] Bayle's Dict. art. de *GRANDIER*.

" depuis

“ depuis la composition de cet article, on imprime en Holland
 “ l’histoire des diables de Loudon, et il paroît manifestement que
 “ la possession pretendue de ces Ursulines fut une horrible machi-
 “ nation contre la vie de Grandier.” One sees from this exam-
 ple what a minister of state could do in influencing a judgment in
 France; and with how little reason it has been affirmed by an
 author, whose book is chiefly upon cases of magic, that justice in
 France is administred “ avec plus belles formes qu’en tout autre
 “ royaume.” This is so far from being true, that some kings of
 that nation have taken off great numbers of persons without any
 judicial process at all. Mathurellus, who was procureur to
 Henry III, makes no scruple of owning this [i]. And Count
 Boullainvilliers [k], says of the antient kings of France, of the first
 race, “ Les rois faisoient souvent mourir les gens par colere et pre-
 “ cipitation, quelquefois par avarice, et apres l’execution ils
 “ faisoient suivre le jugement de morte.” In particular the Count
 says of Lewis XI, that “ ce malheureux prince, le plus habile de
 “ ceux de son tems a fait mourir plus de quatre mille personnes sans
 “ forme de procès où noyés où passés aux oubliettes, où étouffés
 “ en des cachots [l].” And this author farther says, that “ Tristan,
 “ prevôt de son hotel, étoit le juge, le témoin, et l’exécuteur; et
 “ lui souvent le spectateur injuste.” I do not find that the kings
 of Spain have been quite so cruel as this; but several of them
 made no scruple to order persons to be killed without any form of
 justice. Out of a number of instances that might be given to this
 purpose, I shall only quote that of Philip II, who caused one of
 his lords to be killed in the streets of Madrid, and his religious con-
 fessor made no scruple to defend practices of this sort. “ Accord-
 “ ing to the best of my knowledge in the laws,” says he, “ a secular
 “ prince, who hath such power over the lives of his subjects, as, for
 “ a just cause, and according to the forms of justice, to put them to
 “ death, may, having witnesses, put them to death without such
 “ forms. The orders and forms of justice being, for the most part,

[i] Mathur. contr. Hottomanni Francogal. p. 106.

[k] Hist. Abr. p. 200.

[l] C. Boul. tom. iii. p. 498.

“no parts of the law; or at most they are things that may be dis-
 “pensed with. But supposing a king should be unjust, in not
 “observing the forms of law, yet if one that is his subject shall, at his
 “command, kill one who is his subject likewise, he is not guilty;
 “being bound to believe that his prince had just cause to command
 “it to be done: all the actions of sovereigns having the presumption
 “of the law for their being just [*m*].” And even Cardinal Richelieu
 indicated such sort of proceedings, with regard to any penalties
 less than death. “Bien (says he) qu’ au cours des affaires ordinaires
 “la justice requière une preuve autentique, il n’en est pas de-
 “même en celles qui concernent l’etat. Puisque en tels cas ce
 “qui paroît par des conjectures pressantes doit quelquefois être
 “tenu pour suffisamment éclairci. Il faut en telles occasions com-
 “mencer quelquefois par l’exécution, au lieu qu’ en toutes autres
 “l’éclaircissement de droit par tèmoin, où par pieces irreproch-
 “ables, est préalable à toutes choses [*n*].” A plain instance of
 this was the case of Raoul de Presse, who was imprisoned, in the
 time of Lewis X, of France, only for fear he should give council
 to Marigny, whom the court was resolved to destroy; and the
 impetuosity of the king, on this occasion, was so great, that, with-
 out waiting for judgment to be pronounced against him, he con-
 fiscated his goods, and gave them to one of the court favorites;
 and afterwards, when De Presse’s innocence was fully cleared, his
 widow and his children could not recover any part of his effects [*o*].
 But we in England cannot think such arbitrary proceedings to be
 either necessary or expedient upon any views of policy, or justifi-
 able in any cause. We think them, on the contrary, very dan-
 gerous: for an innocent man may be soon greatly injured in his
 fortunes and reputation, by the passion and violence of a minister
 of state; but may not be so easily restored to what he lost. Be-
 cause it is usual for men to hate those they have injured, and to
 back one injury by others, rather than do them justice. We there-
 fore reckon it a great happiness in our constitution, that it does

[*m*] Geddes, Tracts, vol. ii. p. 309.
 liv. ii. chap. 5. p. 30.

[*n*] C. Richelieu, Test. Polit.

[*o*] C. Boul. vol. iii. p. 369.

not subject us to any injuries of this nature. There have indeed been instances, formerly in England, of persons condemned unheard. Mortimer was so in 4 Edward III; Cromwell earl of Essex, the Admiral Seymour, and several others, were so, in Henry the Eighth and Edward the Sixth's time, in parliament. But this has been long since totally laid aside. Persons of all ranks, after having been indicted by a grand jury, are sure of having a regular trial by a petty jury, of having the charge openly made against them, and in cases of treason, of having a copy of the indictment five days before their trial; so that they may know what they will be charged with, and be thereby the better prepared to defend themselves against it. To which end also, by 7 William and Mary, they have counsel allowed, at their own choice, who are to have free access to them; and are to keep their secrets, and not to be examined against them. This is one great point gained, and for want of which many of our ancestors suffered much. Henry I, by a law, took away the liberty of criminals having counsel to plead their case; and so it continued a great while, and, as Parsons observes, must have been the cause of a great deal of injustice. For though, as Lord Coke observes, the court ought to be counsel for the party accused, yet, when the judges were influenced by the crown, they often were not; but frequently the contrary, particularly in Sir Walter Raleigh's case. Think therefore what a great advantage we have gained, by the statute of William III above-mentioned, where persons indicted, even for high treason, have the liberty of counsel.—As to the evidence against a person upon trial; in the first place, there is no making him an evidence against himself by torture, nor by extrajudicial confession. This was not allowed indeed in the Roman republic, except upon slaves: it was thought, that freemen ought not to be subject to it. But as some of the Roman emperors employed it in case of all persons, even of the highest quality, so when the civil law came to obtain in Europe, princes, who then began to be arbitrary, brought this into use along with it. However, they met with some opposition in several nations;

nations, for in the states of Arragon, for instance, held in 1325, it was ordained for law, that no free man should be put to the rack. And in France, among the Grievances represented by the noblemen of Champagne to Lewis Hutin, successor to Philip the Fair, one was about their being put to the torture [p]. But at length the judicial use of torture was settled almost every where. In France, persons of the highest quality are liable to it. Witness the Sieur Montaigne, grand maitre de France (whose case I mentioned before). “On lui donna un effroyable torture, dans lequel il avoua tout ce qu’on voulut. Il fut decapité, et trois ans après son fils obtint le retablissement de sa memoire [q].” In Spain, Antonio Perez, who had been secretary of state, and chief favorite of Philip II, was also put to the most cruel tortures; upon which occasion, Father Salinas, a famous Franciscan preacher, in a sermon, in the king’s chapel, addressed himself to the courtiers in the following words: “Mortals, what is it that you are all mad and “gaping after with open mouths! what! do not you see the danger “you live in? do not you see it? do not you see those who were the “other day on the pinnacle of favour, to day on the rack, and persecuted cruelly for many years, and nobody knows for why [r].” Even in Holland and Switzerland a man cannot be executed without confession; and to this end they employ torture; so that an innocent person is forced to accuse himself falsely.—In England, it is evident, that the use of torture was contrary to law, and regarded as an infamous practice, even in the antient Saxon constitution; for the great Alfred put one of his judges to death, for condemning a person upon a confession drawn out by torture [s]. But in Henry the Sixth’s time, there was an endeavour, by the duke of Exeter to introduce it here [t], from whence the rack in the Tower was called his daughter: and this practice obtained for a considerable time; for in the succeeding reigns, even in that of Queen Elizabeth, there are several instances of persons being tortured.

[p] Count Boul. vol. iii. p. 79.

[q] Count Boul. tom. iii. p. 430.

[r] Geddes, Tracts, vol. ii. p. 321.

[s] Bac. Gov. of England, p. 55.

[t] See Coke’s 3d Inst. p. 34.

Campion a Jesuit, in Elizabeth's reign, was put to the rack [a]. And in Collier's Ecclesiastical History, vol. ii. p. 591. there are instances of several others who were racked in her reign, particularly Francis Throgmorton, who was eldest son of John Throgmorton, justice of Chester. He was twice set upon the rack, in the Tower, upon being charged with an attempt to enlarge the queen of Scots. And in King Charles the First's time, upon Felton's refusing to discover who put him upon killing the duke of Buckingham, there was a proposal for racking him. The king ordered the judges to be consulted upon it; but they declared that any kind of torture, to draw out confession, was contrary to the law of England. And Lord Coke says [w], "that there is no one opinion in our books, or judicial records, that we have seen and remember, for the maintenance of tortures or torments." Our law therefore has, in tenderneſs to the subjects, laid this method wholly aside, except in cases where the person accused refuses to plead. Then indeed he is exposed to paine fort et dure [x]. But this depending wholly upon his will, since he may avoid it by pleading and putting himself upon his country, the law cannot be charged with cruelty in that regard. If he will plead, he shall not be interrogated even upon oath, which is a kind of torture to the conscience. A man's own voluntary confession in some circumstances will not be allowed to be made use of against him; and if he be indicted of high treason, the king can not, by his great seal, or word of mouth, give evidence that he is guilty, for that would be giving evidence in his own cause [y]. He shall be tried upon the evidence that appears, and this evidence, when it is of living persons, must be brought face to face; so that the accused person has a liberty of questioning and cross examining them. This was formerly otherwise. "Depuis quelque tems, on avoit perdu la coutume de confronter les temoins aux accusez [z]."

[a] Camd. Eliz. p. 476.

[w] Coke's 3d Inst. p. 35.

[x] The paine fort et dure is applicable even to a peer, if he refuses to plead before his peers. Hale's P. Crown, p. 319.

[y] See Hale's P. Crown,

p. ii. 282.

[z] Rap. Edw. VI. vol. vi. p. 61.

But the confronting of witnesses with the person accused was soon after provided for, by a statute of 6 Edward VI. ch. 11. The judge who presides, and gives directions in the trial, is by law to be of counsel with the prisoner, and indeed he was always so, but this did not prevent great hardships when the judge was against him, as Jefferies and others often were. Formerly the prisoner could have no other counsel in cases of treason (the duke of Norfolk, in Queen Elizabeth's time, was denied it [a].) But at present he is intitled by law to that advantage of counsel, so that he can scarce miscarry for want of making as good a defence as his case will bear. When the cause is summed up, the jury are to determine it, *i. e.* they are to judge of the facts upon which the merit of the cause turns. How far such facts are criminal in law, they are indeed directed by the judges; but still they are at liberty whether they will be wholly governed by the judges opinions or not, for they give their verdict in general, so that though they think the facts to be sufficiently proved, yet if they do not think as the judges do that such facts are criminal, they need not bring in the parties guilty. The great judge Lyttelton, in his Tenures, sect. 386. declares that "if a jury will take upon them the knowledge of the law, upon the matter, they may. Which is agreed to likewise by Lord Coke in his Com. thereupon." And Sir M. Hale [b] says, "that the jury are judges not only of the fact, but of the law." And it seems highly probable to me that, by law, the juries in all cases ought to be judge of the points of law, as well as of the fact; because originally the persons of the jury seem to have been in the nature of judges and to have sat upon the bench [c]. In the trial of a peer, the case is determined by a majority of the peers present; but in the case of commons, the verdict of the jury must be unanimous; and in order to induce them the sooner to agree in it, they are put into a room together without any provisions, so that it cannot be long before they must be forced to agree [d]. Now this necessity of the jury's being unanimous is a

[a] Camd. Eliz. p. 438.

[b] Hist. Law, p. 140.

[c] See Olaus Verelius in Hickes's Dissertation, &c.

[d] The verdict in capital cases must be given openly in court, Hale's P. Crown, p. 267.

circumstance.

circumstance of great advantage on the side of mercy; for a single man, or a few, will seldom stand out so resolutely on the side of condemnation, as they will for the acquittal of one whom they believe to be innocent. Such a person may be, and sometimes has been, saved by one resolute jurymen [e]. There have been instances when a verdict has been taken for sufficient without the unanimous consent of all the twelve jurors [f]; but this has been by the direction of some arbitrary minister or judge, and has always, by the legislative authority, been condemned as illegal. No new trial is ever granted, in criminal cases, when the defendant is acquitted, if some fraud or trick be not proved in the case [g]. The jury are not now punishable for their verdict, whatever it be, in any criminal case. Formerly the court used to fine and imprison them, if they did not find people guilty. Empson, in Henry the Eighth's time, was tried and condemned for having, among other oppressive practices, imprisoned a jury, when they had acquitted a person charged with felony, whom he thought guilty, and obliged them to appear before the king's council, where they were severely fined. And Throckmorton's jury, in the reign of Queen Mary I, were severely fined by the queen's council, in the Star-chamber: their fines were set by the lord chancellor at a thousand pounds a piece, at least, and they were remanded to prison till further order was taken for their punishment. Soon afterwards, three of them were adjudged to pay two thousand pounds a piece, and the others, upon their submission, had their fines mitigated [h]. However, the imprisoning and fining a jury has always been deemed an oppressive act, and contrary to the laws of the land. This is the form of trial which probably our Saxon ancestors brought over hither with them; since we not only find some traces of it in their laws, before the conquest, but still earlier, in the constitutions of other northern nations, among all whom somewhat of this nature seems to have had place. Among the

[e] See a remarkable instance of this kind copied from Lord Chief Justice Anderson's Report, in the English liberties, p. 262.

[f] Hale's P. C. part ii. p. 298.

[g] Hawk. P. C. p. 442. b. ii.

[h] See Holinhead's Chron. p. 11. 21.

Swedes, there was antiently a constitution like that of juries. But there the twelve men were assistants to the *regius præfectus* in judgment, and were inquisitors like our grand jury, as well as judges of the fact like our petty jury. The votes of seven out of twelve would be sufficient to condemn [i]. The first law we meet with for determining the number of jurors here in England to twelve was that of Ethelred I, above two hundred years before the Conquest. "In every hundred let there be a court, and let twelve
"antient freemen, together with the lord of the hundred, be
"sworn that they will not condemn the innocent, nor acquit the
"guilty [k]." In the superstition indeed of those ages, the *ordeals*, and frequently the combat, were preferred before it [l]; so that it was not much used for a great while [m]. But at length men came to be sensible of the excellency of this way of trial, and so it has continued in use ever since; and has been one of the great supports of our liberty: having preserved a great number of lives and fortunes, that would otherwise have been lost. Many instances to this purpose might be produced; but the thing is too plain to need more proof. So that when foreigners have spoke of this as a terrible judicature, and subject to great inconveniencies, they seem to have been ignorant of what it was. Mr. Rapin Thoyras, who could better judge, was of a different opinion. "Ce privilege (dit il) que les Anglois ont conservé jusque à ce jour
"est un des plus considerables dont une nation puisse jouir: il
"met les petits à couvert de la violence des grands, et de la passion
"ou du caprice du souverain même; comme on en a vu diverses
"exemples en Angleterre [n]." I must here add that to this trial by jury every one has a claim, in time of peace, except those who are actually in military service, and thereby subject to martial law. Which law has always been in this nation under certain regulations: its proceedings more summary, and its punishments more rigorous, than the common law would allow in other cases. The

[i] See Olaus Mag. p. 488.

[k] Tyrr. vol. i. Intro. p. 123.

[l] See about ordeal trials in Bacon on Governm. part i. p. 55.

[m] Lord Coke says, that ordeal trials were taken away by parliament 3 Henry III.

[n] Rapin, tom. i. p. 516.

nature of military service requires this. But yet this, antiently in the Saxon times, was not left to the arbitry of the general, but was made by parliament [o]; nor was it suffered to be executed upon any but in time of actual war: and therefore the judgment given against Edmund earl of Kent, at Pomfret, 15 Edward II, was reversed in parliament 1 Edward III, because it was given by colour of martial law in time of peace [p]. However, in succeeding times, the crown assumed a power of extending the martial law to civil cases; for after the rebellion in 1537, 28 Henry VIII, the court ordered a captain of the rebels, and seventy other persons, to be hanged by the martial law [q]; and in the reign of Edward VI, we have an instance of a man condemned and hanged by a court martial [r]. In 1588. several popish, and other seditious books, having been brought into the realm, Queen Elizabeth published a proclamation against them, in which she forbade them to be dispersed, uttered, or kept, and commanded that offenders, in this point, should be proceeded against, by martial law, with all diligence and severity: and that none of her lieutenants or deputy lieutenants, should for any such proceedings, by martial law, be any time hereafter impeached or prosecuted, any law or statute to the contrary in any wise notwithstanding [s]. And in the reign of Charles I, commissions for trial by martial law were issued by that prince, notwithstanding the violent remonstrances of the house of commons; and, by the petition of right, this practice was declared arbitrary and illegal [t]. However, notwithstanding all this, Kirk and others, in King James the Second's time, hanged up great numbers of poor people, without any form of trial. Now this martial law cannot be executed upon any but soldiers, in time of peace; and upon them only with certain limitations, and in virtue of an act of parliament that is renewed every year. And as all persons are thus secured from being found unjustly guilty, so if they should be so found, the punishments are not arbitrary.

[o] Bacon on Governm. p. 40.

[p] Hale's Hist. Laws, p. 40.

[q] See Echard. Hist. vol. i.

[r] Stow's Survey Lond. p. 156.

[s] Strype's Ann. vol. iii, p. 570.

[t] See Rushw. vol. i. p. 570.

The king cannot grant the forfeiture of the lands or goods of the person accused before he is condemned, because this grant might cause the grantee to prosecute the culprit with more malice or vehemence [a]: neither can corporal judgment upon crimes be given against a man in his absence [w]. The judges cannot invent new punishments, nor add new circumstances of rigour: these are determined by law, as well as the crimes. The cases in which death is to be inflicted are all specified by known laws. The king can remit, in some cases, part of the rigour, but he can not increase it. When Charles I would have had Felton's right hand cut off before his execution, the judges would not consent to it [x]. And when Henry VI, by his own authority, condemned De la Pole, duke of Suffolk, to banishment, the house of lords protested against it.

IMPRISONMENT for life, or banishment, cannot now be inflicted at all, but by act of parliament, or sentence of the courts of law [y]. The king cannot so much as oblige any person to accept an employment abroad, not even in Ireland. Under which pretence frequently persons in other countries have been banished. This was attempted in Sir Thomas Overbury's case: he was sent to the Tower, because he refused an embassy into Russia [z].

IN like manner as to fines, care is taken that they shall not be exorbitant. Where the party is to be amerced, though he be at misericordia domini regis, yet the amercement must be affirmed by the jury; and when he is to be fined ad voluntatem domini regis, yet this fine must be set by the judges [a]. The king himself cannot impose a fine upon any man, but it must be done judicially by his judges: and so it hath been resolved by all the judges in England [b]. But, Salvo contentamento, says Mag. Chart. and because in several reigns this was violated in that point, reinforcements of it have been obtained at several times. 15 Edward III, the commons petitioned that many commissions, whereby sundry men have been fined by the commissioners outrageously, may be re-

[u] See Coke's 2d Inst. p. 48.

[x] Rushw. Coll. part i. p. 640.

[z] Rushw. vol. ii. p. 435.

[b] Ibid. vol. i. p. 540.

[w] Trial par pais, p. 31.

[y] Coke's 2d Inst. p. 47.

[a] Rushw. vol. ii. p. 508.

voked. And in the seventeenth year of the same reign, they petitioned again that excessive fines, set on the king's subjects by such as have leets, may be redressed; which the king readily consented to [c]. During the reigns of the Stuarts, many excessive fines were laid on persons, for very small offences, viz. Mr. Hamden, for a misdemeanor, in Charles the Second's time, was fined 40000 l. and the earl of Devonshire, for caneing Col. Culpepper, was fined 30000 l. But the bill of rights, 1 William and Mary, put a stop to this arbitrary practice. In all offences finable at present, the imprisonment is to be only till the fine is paid. If the fine be tendered, there is to be no imprisonment at all [d]. Upon the whole, I think that, in criminal matters, a subject in England has as great security for his life and liberty as can reasonably be desired.

WITH regard to our property, we are also in a more advantageous condition than most other nations in Europe. We hold it in a free and almost independent manner. Those burthens incident to knight's service in capite, which were so heavy upon our ancestors, are now entirely abolished. The feudal services, and particularly that of knight's service in capite, were wisely contrived at first, and accommodated to the circumstances of those ages when it was introduced: and, among the Saxons, those services were easy enough; but after the Norman conquest, they were so far aggravated, as to become a real and a heavy burthen: particularly since the Norman conquest was introduced that article of the marriage of wards, &c. [e], which was justly accounted very injurious to the subject. From this branch of prerogative the king had it in his power to dispose of any heiress, whose estate was held of him, to what person he pleased. He was indeed to do it without disparagement to her. But this might be done, and yet no provision might be made for her real happiness in marriage.

[c] Cott. Abr. p. 32, and p. 40.

[d] Trial par pais, p. 468.

[e] Kennet says, in his notes on the Hist. of Engl. vol. i. that the parliament in 7 Henry III, granted the king the wards and marriage of their heirs. But Lord Coke's Comp. Copyholder, p. 22. says that the use of wardships was on foot before Henry the Third's time.

THOSE great estates which often fall to heiresses were considered as the means of the crown's gratifying its needy dependants: this must have been a mortifying consideration to parents in regard to their daughters. Nor could they be much more at ease about their sons, whom they were to leave under age; for we find, in Henry the Third's reign, that the earl of Savoy came to the king's court, at London, and brought with him several young women from his own country to be married to the young noblemen that were the king's wards: which thing much disgusted the English [f]. The crown was intitled to the wardships of them, and as well to the profits of their estate, however great, for their education.

THIS revenue was usually granted to some favorite, who made the most of it: and to that end, frequently committed, or suffered, waft upon their lands. It is true, by some laws, provision was made against these damages, and remedy was given; but such as was hard to come at, and mostly insufficient [g]. And when the heir came of age, there was so much trouble in suing livery, so much danger in omitting any forms, and so many persons ready to take advantage on behalf of the crown, that scarcely any one could escape wholly clear of these briers [h]. It must farther be noted, that there was hardly any estate of value but was incumbered with these inconveniencies, from tenure by knight's service to the crown. Because if there was ever so little a parcel of this tenure in an estate, that parcel subjected all the rest to these incumbrances; so that the gentry of England were terribly subject to be hampered in those ages. Empson and Dudley, in Henry the Seventh's reign, used to enthrall and charge the subjects lands with tenures in capite, by finding false offices, thereby to work upon them for wardships, premier seizins, and alienations, being the fruit of those tenures: refusing, upon diverse pretexts and delays, to admit men to traverse those false offices according to the law. Nay the king's wards, after they had accomplished their full age, could not be suffered to have livery of their lands, without paying excessive fines: they did also vex men with informations, about instructions

[f] Brad. Hist. Engl. part iii. p. 598.
and Statute of Glocest. cap. 5.

[g] See Coke's 2d Inst. p. 389.

[h] See Bacon, Govern. of Engl. part. i. p. 159.

upon scarce colourable pretences [i]. And the house of commons, in a petition to King James the First desire, that, among other things, he would be pleased to grant an act of pardon, which shall extend not only to criminal offences, but also to the relief of old debts and duties, due to the crown before the first year of his majesty's reign, to the discharge of alienations without license, and misusing of liveries, and ouster le mains, before the first summons of this parliament; of concealed wardships, and not suing of liveries and ouster le mains, before the twelfth year of your majesty's reign. Which gracious favour would much comfort your good subjects, and ease them from vexation, with little loss or prejudice to your own profit [k].

At first, our ancestors could not alienate these knight's service in capite estates without license; by degrees, they got a liberty of doing that; and though the crown made great difficulty of parting with the tenures of knight's service, and the court of wards, yet, at length, after the restoration, that point was gained, by giving the crown 100,000 £. per annum out of the excise.

At present, therefore, our gentry hold their lands only in fee socage, having few of them any thing to do with the crown; but are at liberty to marry their daughters to whom they will, to give what guardians they please to their sons, and in general to make what improvements they think proper, without apprehension of waste to be committed upon their estates.

As the manner of holding our property is thus advantageous, so the administration of justice, in case of any contest about it, is far better secured than it was formerly among our ancestors. For some reigns after the conquest, there were great injustices practised, and difficulties put upon the recovery of right. Florence of Worcester says, that in William Rufus's time, "*omnis legum filuit justitia, causisque sub justitiâ positæ sola in principibus imperabat pecunia.*" It was agreed between Earl John and Bishop Longchamp, in Richard the First's time, that no persons, of the rank of noblemen or free tenants, should be disseized of their lands and goods at the pleasure of the justices, or king's ministers, but by the judgment of his court, according to the lawful custom of this kingdom, or the king's mandate.

[i] See Lord Bacon's Hist. Henry VII.

[k] Rushw. Coll. vol. i. p. 43.

THIS agreement shews evidently, that it had been the practice of the ministers to commit such wrongful violences. In the year 1198, in the same reign, the clergy, having refused to grant the king five shillings upon each plow land, as the laity had done before, though this was assessed upon the laity without common assent; the king, in revenge, issued out a proclamation, that whoever injured a clergyman, in any thing, should not be compelled by law to make him any satisfaction; but if a clergyman owed a layman any thing, he should be obliged to make him true payment [1]. And it was usual with the kings not only to do injustice themselves, but to deny remedy, in a legal way, against subjects, who had thus injured others. Even after the grant of Magna Charta, Henry III forbade his chancellor to issue out any writs that might prove prejudicial to his brother Earl Richard, or to Richard earl of Gloucester, Peter of Savoy, or any of the king's half brothers, which, says Matt. Paris very justly, was contrary to the law and peace of the kingdom [m].

EDWARD, I gave a writ to the abbot of St. Peterburg, setting forth, that now he might indeed, by his prerogative, hinder any one from suing the king's debtor to execution; but there is no appearance that he had any such power, but that it was an arbitrary protection; of which, in the time of Edward II, complaint was made by the commons, and redress obtained, except in particular instances. And in 2 Edward III, cap. 8. it is enacted, that no commandment, under the king's seal, shall disturb or delay justice. In 5 Edward III, it is enacted, that no justice shall defer or stay the execution of justice, neither for the great seal, letter, nor other commandment [n]. In 46 Edward III, the commons complained that of late the court of King's Bench had refused the people to search and to have exemplifications for evidence against the king, or to his disadvantage. Therefore they pray that any person whatsoever have leave to search the records, and have exemplifications, though it concerns the king, or any other. The king's answer was, that it should be so [o].

[1] See Brad. Hist. Engl. vol. i. and Tyrrell's Richard I. p. 563.
Henry III. p. 973.
Atk. p. 42.

[n] Cott. Abr. p. 9.

[m] Ibid.
[o] Sir Rob.

(As) causes were often thus delayed by the king, so it was usual to give him fines and presents in money, and other things, for his permission to try certain causes. In the reign of Richard I, William de Latimer gave 100 shillings to have a trial at law with Galfrid de Valors, who had possessed himself of part of his park. And in the reign of King John, William de Stutevil gave 2000 marks pro judicio habendo about a barony, in controversy between him and William de Albany [p]. The men of Yarmouth against the men of Winchelsea, “afferunt domino regis tres pal-fridos et sex asturias narenfes ad inquisitionem habendam per legales [q].” In opposition to such practices the article of Magna Charta, *nulli negabimus aut vendemus justitiam*, was intended: which practice however continued in a great degree down to later times.

In 8 Edward III, there was a petition presented to the king in parliament, that all men may have their writs out of chancery, for only the fees of the great seal, and without any fine, according to the great charter. The king's answer was, that such writs as be of course shall be so; and such as be of grace, the king will command the chancellor to be gracious [r]. Gardiner, in the time of Mary I, “refusoit tout justice dans la cour de la chancellerie à ceux qui ne vouloient pas s'engager à seconder les desseins de la reine [s].” And we are told by another author that this princess ordered her chief justice, that persons who had any suit or contest with the crown should have right done them as well as others: which evidently proves that the practice had commonly been otherwise, else there had been no occasion for such an answer [t]. Such oppressions were antiently the more in the favour of the crown, because it not only appointed the judges, with commissions only during pleasure, and so might influence them, as it often did, but also had in itself a great share of judicial authority. Bracton says [u], “rex, et non alius, debet judicare si solus ad id sufficere posset.” And the same au-

[p] Brad. vol. i. p. 209.]

[q] Hale's Hist. Law, p. 152.

[r] Cott. Abr. p. 15.

[s] Rap. Hist. Marie I.

[t] See Holinsh. on Throckmorton's trial.

[u] Lib. iii. cap. 9. fol. 105.

thor says, that in civil causes, “*si curia domini ei (i. e. tenenti)* “*defecerit, transferri debet placitum ad comitatum, ut vicecomes* “*rectum teneat: et sic a comitatu transferri poterit ad magnam* “*curiam ex certa causa, si dominus rex voluerit et ibi terminari.*”

IN this Magna Curia, says Dugdale [w], which was within the king's palace, before him and such of his nobles as he pleased to associate with himself for that purpose, the justitiarius Angliæ seems to have presided. And this was the case, not only after the Norman conquest; but was in a good measure so even in the Saxon times. For though our industrious antiquary Madox was of opinion that there was no such curia regis, where the king administered justice in person, in the Saxon times [x], yet the contrary seems to appear from the laws of Canute the Great [y]; which allow the plaintiff an immediate appeal to the king, if the shire-gemote delayed this remedy above four court days. After Menev. de rebus gestis Alfredi, p. 69. ed. Oxon. says, “*Studebat is [Alfredus] quoque in judiciis propter nobilium* “*et ignobilium suorum utilitatem, qui sæpissime in concionibus* “*comitum et præpositorum pertinacissime inter se dissentiebant;* “*ita ut pene nullus eorum, quicquid a comitibus et præpositis* “*judicatum fuisset, verum esse concederet; qua pertinaci dissen-* “*sione obstinatissime compulsi, regis subire judicium singuli suba-* “*rabant.*”

THE case was the same indeed, in this respect; in the other Gothic constitutions. Snorro Sturlonides [a] tells us, that “*rex* “*Olaus summo mane surgere solebat, corporisque curâ habitâ* “*liturgico interesse officio, quod matutinis celebrabatur horis;* “*hinc in judicio pro tribunali sedendo lites dirimere publi-* “*caque tractare negotia. Ad hoc judicium pauperes pariter* “*divitesque, omnisque sexus et conditionis homines, provo-* “*care licebat.*” Des Roches [b] tells us, that Eric IV, king of Denmark, about the year 1136, “*continua à donner ses soins au* “*gouvernement de son royaume. Il rendoit la justice en personne.*”

[w] Orig. Juridic. p. 5.
leg. 16. edit. Wilkins, 136.

[x] Mad. Hist. Exch. p. 63.

[y] Part ii.

[a] Hist. Reg. Septentrionalium, p. 437.

[b] Hist. Denmark, tom. ii. p. 307.

“—Dans ce temps, la seule connoissance des affaires de peu de
 “consequence étoit attribuée aux officiers municipaux des villes :
 “mais, s’il se trouvoit quelque cause importante, elle étoit réservée
 “au roi, qui la decidoit, et sa volonté servoit de loi dans les affaires
 “douteuses.”

It was thus likewise in France; for Mezeray says [c],
 “Le roi tenoit audience un jour toutes les semaines; on ne
 “portoit devant lui que les causes des grands qui n’avoient point
 “autre juge que lui, et celles sur quoy les envoyez ou les countes
 “avoient denié de faire justice, ou qu’ils avoient jugés contre la
 “loi.” De Seyssel, archbishop of Marcellles, indeed observes that
 there was a parliament to limit the authority of the king of France
 in this respect; and, on that account, he much commends their
 constitution. “La justice (says he) sans point de difficulté est
 “plus autorisée en France, qu’en nulle autre pais de monde que
 “l’on sache, à cause des parlements, qui ont été instituez princi-
 “palement pour cette cause, et à cet fin, de refrener la puissance
 “absolue dont voudroient user ses rois. Et si furent des le com-
 “mencement établis de si grandes personages, en tel nombre et
 “avec tel puissance et pouvoir, que ses rois y ont, quant à la justice
 “distributive, toujours esté subjects; tellement que l’on a justice
 “à raison à l’encontre d’eux aussi bien que à l’encontre des subjects
 “en matieres civiles [d].” And this might possibly be designed to
 have been their original constitution in that kingdom; but the
 parliament of Paris, which is but the shadow of the antient great
 councils, never had this authority in controlement of the king’s
 jurisdiction sufficiently established.

The kings of that nation have frequently broke in upon it, and
 have asserted that they had a right so to do. Cardinal de Richelieu,
 at least, laid it down as a maxim that the parliament was to confine
 itself to causes between subjects and subjects, and not to meddle
 with those in which the crown was concerned. “Je mets en
 “avant (says he) que ne faut autre que restraindre les officiers de
 “justice, et ne se meler que de la rendre aux sujets du roi, qui est

[c] Mezeray Abr. tom. i. p. 184.
 France, p. 10.

[d] De Seyssel, Monarchie de

“la seule fin de leur établissement [e].” And since this time, the king’s privy council has acquired a right of drawing before itself all causes whatsoever. “Qu’on sache d’une manière à n’en pouvoir douter (says Guillard Hist. de Council du Roi, p. 68.) que le conseil du roi n’a point d’autres bornes que l’étendue de son empire.” And again he says, “Personne ne peut dire que le conseil du roi ne puisse pas dans certaines occasions connoître les affaires particuliers; les évoquer à soi et les décider définitivement, sans les renvoyer à des juges ordinaires.” He owns indeed that there was an ordinance made at Blois, in 1579, and an edict in 1597, on occasion of the assembly of the nobles at Rouen, by which it was forbidden “que les causes de partie à partie qui consistent en juridictions contentieuses fussent traitées au conseil privée, et ordonné qu’elles seroient renvoyées par devant les juges qui en devoient connoître [f].” But the same author [g] tells us, that “par un arret de conseil, de 8 Juillet 1661, le Roi Louis XIV, fait defenses à toutes les compagnies souveraines de prendre connoissance des procès dont sa majesté aura retenue et reserve à la jugement de soi et à son conseil, à peine d’encourir son indignation.” Since which time the parliaments have never effectually, if at all, pretended to interpose in matters of that nature.

THINGS were likely to have come to the same pass here in England; for, as I observed before, the king had, by our original constitution, a great share of judicial authority, which he might use, when he pleased, very much to the oppression of his subjects. Lord Chief Justice Fortescue indeed affirms, that “*proprio ore nullus regum Angliæ judicia proferre usus est.*” And Lord Coke was of opinion, that the regal authority of judicature was so anciently committed and distributed by the king, to the several courts of judicature, that, in the times of Bracton and Britton, the king could not give judgment in person, or fine any one. But, from the passages before cited, it has appeared, that our Saxon kings did frequently try causes, and gave judgment in person; and that the Norman kings continued to do the same, or had a right

[e] Test. politique.

[f] Guillard, *ibid.* p. 79.

[g] *Ibid.* p. 66.

so to do, appears from Gervase of Tilbury; who, speaking of the Exchequer, says, "*habet enim hoc commune cum ipsa domini regis curia in qua ipse in propria personâ jura decernit.*" And art. 13. *affizæ factæ apud Clarend.* in the reign of Henry II, it is said, "*nisi tam grandis sit querela quod non possit deduci sine domino rege, vel talis quam justitiæ ei reponent pro dubitatione sua, vel ad illos qui in ejus loco erunt.*" Here the judges of the King's Bench are evidently distinguished from the king's person: and he is represented to have a judicial authority, in himself, distinct from them. Henry III sat and spoke in court, determined causes, as he travelled through the country; and even in person set amerciaments on several persons [b]. And though after the time of Edward I, our kings seem to have exerted their judicial power less and less, yet still they continued to retain a great deal of it, and to exert it, when they pleased, in several cases.

AND not only several of our kings, but even their privy councils, by the king's authority, used to take upon them to judge in various causes, wherein private property was concerned; and that even in original causes, which naturally might have belonged to the ordinary courts of justice. This does very clearly appear by the complaint of the commons in parliament, 25 Edward III, petitioning that no man should be put to answer for his freehold before the king's council, or before his ministers. To which petition the king readily agreed [c]. Again, 37 Edward III. cap. 18. there was an act made against suggestions to the king, by which people were frequently put out of their freeholds without due process at law. In 2 Richard II, the commons petitioned, that no man, by writ or otherwise, be forced to answer for his freehold before the council, but at common law. To which the king answered, that no man shall be forced to answer finally thereto, provided that all persons shall answer before the council for oppressions [d]. In 1 Henry IV, the commons again petitioned, that all personal actions between party and party may only be

[b] Madox's Hist. Excheq. p. 104.

[c] Cott. Abr. p. 74.

[d] Lambard's Arch. p. 122.

tried by order of the common law, and not otherwise. To which the king answered, that the statutes therefore provided shall be observed; except one party is so grand, and the other so poor, that he could not by that means have recompence [7]. By the answers given to the commons petitions, in this behalf, we see that our kings were unwilling to part with this judicial authority.

AND in fact they retained it in no small degree, and even had it, in some respects, augmented by those statutes in the reign of Henry VII and Henry VIII, which regulated the judicature of the Star-chamber court, of the court of Requests, &c. In these courts, the privy council determined several matters in which property was concerned, and which would, in the ordinary course of law, have been determined by the courts in Westminster-hall. How much the nation found themselves aggrieved by these proceedings, we see in our histories from the reign of Henry VII, till the Star-chamber-court was given up by Charles I. It was an article objected to the duke of Somerset, in Edward the Sixth's reign, that, contrary to law, he held a court of Request in his house, and forced divers persons to answer there for their freehold and goods, and did determine of the same [m]. King James I frequently sat in the Star-chamber, and determined various causes [n]; and in the reign of Charles I, the proceedings of the Star-chamber were some of the things which drew the most odium upon that prince; and yet it was very difficult for the nation to get a remedy; because, as I have already observed, these authorities were not without some foundation in law, and were very advantageous to the support of the authority of the crown.

BUT at length, in the sixteenth year of this prince's reign, the commons in parliament, taking advantage of the ill use that had been made of these authorities, by the ministers of the crown, and the distress of this prince's affairs, obliged him not only to give up the Star-chamber-court, but utterly to restrain the privy council from meddling in matters of property. So that now, instead of having our causes determined by a privy council, we have them

[7] Cott. Abridgment, p. 398.

[m] Burnet's Hist. Reformer, vol. ii. 189.

[n] Rushw. Coll, vol. i.

tried before a jury of our fellow-freeholders, who are instructed, as to points of law, by judges, who have not only their places for life, and consequently need not be under the influence of the court, but are under the inspection of parliament; and, as judges, can take no fees. Moreover our juries, in civil matters, are now so regulated, that it is almost impossible for them to be corrupted; which is a point of the greatest advantage to the subjects.

THIS may not be so generally allowed with regard to the judicial authority of the house of peers, in the manner as it is exercised at present. For I know several gentlemen who are frequently expressing their dissatisfaction upon this head [e]. They think it hard that the whole property of the people of England should be subject to the decision of a body of men, who are of a different order, and have different interests from the commoners. They will not allow that this was antiently the case; or, if it was, yet the lords being now very different, in several circumstances, from what they were then, they ought not to be any longer vested with the sole judicial power, but ought to have a number of commoners joined with them.

BUT, if I may take the liberty to give you my opinion upon matters of so great importance, I must profess that, upon the best inquiry I have been able to make, it appears to me, that the jurisdiction of the house of peers, in some cases, is of as great antiquity as any part of our constitution: and likewise of so great advantage, in some respects, to the whole constitution, that it ought to be maintained inviolate; as to its antiquity, it is plain from the feudal law, as it obtained among other nations, that the barons, or tenants in capite of the king to a certain value, were to be judged by their peers, in his court, both in criminal and in civil causes. And that appears to have been the case in England, from the various examples hereafter alledged. It is, farther, probable that the peers were to be judges in all causes wherein the king was a party, if justice was not done in his courts; for Bracton

[e] See Temple's Miscel. part iii. p. 83, 84, &c. See also the Case stated of the judicature of the peers in case of appeals, p. 61.

and Fleta intimate this, and the Mirror de justice expressly says it. Not that the house of peers had any coercive jurisdiction over the king; our law books expressly say the contrary of this. The peers had only a directive jurisdiction: but to this our kings, of the best character, generally submitted; as we find by many instances in Ryley's *Placita Parliamentaria*, where many cases, in which Edward I and II were concerned, were determined; as well as other cases of lords and commons, which came before the lords originally, as well as by appeal.

SOME persons indeed have supposed, that all the lords had not a right to judge in these causes; but only those lords who were appointed by the king. It is true, there are several precedents in parliament, and some in book cases, which prove that an inferior kind of judicature has been exercised by the lords on writs of error. But, from the nature of our constitution, and from the *Plac. parl.* in Edward the First's time, it seems that, in cases where the king or the lords were concerned, and even in all matters upon appeal, the right of judicature was vested in all the lords [p]: and the act of parliament 14 Edward III. cap. 5. is not repugnant thereto.

THE committee of lords there provided was indeed to have a commission and power from the king. The reason of which was, that the king is, in the supposition of the law, the head of that court, and therefore ought either to be present in person, or virtually by his commission to others [q]. And so in like manner, if any thing was to be done by the lords out of parliament, it might be necessary to have such a commission. But this does not prove any thing against the authority of the whole house to judge causes. On the contrary, it appears from this very statute, that the whole house had an authority superior to the lords committees. Agreeably to which, in the preamble of the statute of Elizabeth, for determining errors in the intervals of parliament, by a commission from the queen, there is still room left for a recourse to the judgment of the whole house of lords, in parliament. So that the

[p] Ryley's *Plac. Parl.* p. 304, 361, and 372.

[q] See *Cott. Posthu. judicial*

judicial authority of the whole house of lords is certainly an antient part of the constitution.

BUT whether this judicial authority of parliament was antiently vested in the house of lords alone, exclusive of the commons, hath been thought a point not quite so certain: our most eminent antiquarians have been of different judgments about it [r]. Some of them have thought that, this judicature being parliamentary, the commons are intitled to a share in it; and the rather, because their having formerly been included in the baronage, and having sat with the lords in one house [s], it could hardly be otherwise, but that they must have had a share in determining the causes then moved in parliament. And, indeed, as it is evident that the commons did join in judgments of attainder, passed in a legislative way, so there is also reason to think that they did sometimes concur with the lords in declaring the law; and even in making awards in particular cases, even of a civil nature. William de Septivant's case is an instance of it, and others quoted by Mr. Petyt. But this seems rather to have been practised by the consent of the lords, in those particular cases, in order to add greater weight to their own decisions, than because the commons had a strict right to concur in all such cases.

FOR though it be true, that many such as are now commoners were antiently a part of the baronage, and, as tenants in capite, were also members of the great Curia regis, yet it is also true that there was very antiently a distinction between the Greater and Lesser barons; and the right of judicature, in the Magna curia, seems to have been vested in the former only, with the king at their head; though the latter might sometimes be present when judgments were given by the former. I am sensible that Mr. Madox thought that this distinction between the Greater and the Lesser barons was frivolous, and made without reason, by Spelman and Selden; but he ought to have considered that those great antiquaries did not make this distinction themselves: they found it already made in Magna Charta. Selden thought it was made some

[r] See Cott. Posth. f. 349.

[s] Lex Parl. p. 54.

little time before that charter, but it seems to have been much more antient than that, as appears by Fitz-Stephen, and Gervase of Tilbury. And this distinction is of importance, because it seems that to those Greater barons, and not to the Less, the judgments in parliament always belonged of right. For it is certain, from the instances here given, that all the Greater barons had a right to be concerned in the judgment there given. But that the Lesser barons had not that right, properly speaking, appears from Archbishop Becket's case, in the reign of Henry II. And it seems very probable also from hence, that the Lesser barons were not reckoned peers like the Greater barons.

IN what the difference between them consisted is not easy to say, but it seems to have been in their estates. But in whatsoever the difference consisted, these Greater barons were to have writs sigillatim; the Lesser barons were to be summoned only by a general writ. And from hence too we may perceive why the house of commons, who came into the room of the smaller tenants in capite, stand uncovered, and have always done so, before the lords. Which they would not do now, if they had not always done so; for they have been always gaining ground, as to their rights and privileges. The commons never could give an oath in any matter which did not concern their own privileges; which shews they were not a court of judicature, and that judgment always belonged to the lords solely [t].

IN 4 Edward III, the lords are characterized as judges of parliament; which indeed the commons did not dispute, in Henry the Fourth's time, when that king and the lords declared, that judgment belonged solely to them; and this course hath been ever since observed. There are numerous instances in which the lords have judged in parliament, not only in the causes of their peers, and those where the king has been party, but in others also brought before them; and even in original causes [u].

BUT it is said that the lords are now upon a different foot from what they were then. For they then sat in virtue of their tenures

[t] See Case of Appeals, p. 18.

[u] Ibid.

by barony, which secured to them a competent estate; and when the estate failed, the barony ceased; or, at least, the right of sitting in parliament was suspended. So that the house of lords must always have been filled with persons of great or very considerable estates. This must be confessed to have been in some measure true. Tyrrel, in the life of Stephen, p. 228, tells us, that “Earl Hugh, brother to the earl of Leicester, being a loose careless man, was reduced to great poverty, and from an earl fell to be a knight.” The duke of Bedford, in Edward the Fourth’s reign, was degraded for poverty and want of possessions to support his title. And William Lord Say and Seal, in the same reign, having been twice taken prisoner, and thereby necessitated to mortgage and dispose of the greatest part of his lands; thereby his barony became extinct, and none of the family were summoned to parliament for several descents, though they continued to use the title of lords till King James the First’s reign [w], when by letters patent, obtained from that prince, the barony of Say and Seal was recognized to belong to that family.

BESIDES the descent of honour, a certain number of knight’s fees ought also to descend for the maintenance thereof [x]. And it would have been desirable, that, when the custom of making lords by writ, and by patent, was introduced, this circumstance had been settled, that they must have an estate of such a value, in order to keep their seat in that house. This would really have been for the service of the crown, as well as for the dignity of the peers. But, the practice having been otherwise, for a long time past, an alteration of the constitution, in this point, is not practicable at present; and therefore what is now to be done, is to preserve, as much as possible, the dignity and influence of that house upon the present foot. And whoever judges truly of the interest of our constitution will be clearly of the opinion that a peerage is absolutely necessary, for several good purposes, especially as a bank or screen to the crown. “If we had no peerage now upon the old constitution, yet we should be necessitated to make an arti-

[w] Dugd. Bar. vol. ii. p. 247.

[x] Elfyng of Parl. p. 54.

“official peccage, or senate, instead of it [y].” Cromwell himself found it necessary to do so: and it is more so every day, in proportion as the house of commons goes on gaining ground.

EVERY one therefore, who is no republican, ought to desire to support the dignity of the lords house as much as possible; and, to that purpose, it is necessary, at present, that all the prerogatives of that house, and especially the right of judicature, should be preserved entire; for, if this should be lost, they would find it impossible to preserve their dignity. If it should be supposed, that there are some young, unattentive, and unskilful persons, at all times among them; it is certainly true, on the other hand, that there are, and always have been, others of great knowledge and probity, who take care that there shall be no just ground for complaints, in their administration of justice. In fact, I do not find there have been many causes complained of; and, probably this same care will always be taken, not only from their innate honour and probity, and regard to justice, but also because they know that the house of commons have their eyes open upon them; and that the commons will be likely to be supported by the people, in case the house of lords do any thing amiss. So that, upon the whole, the last resort could not easily be better placed; nor the judicial authority in general be much better administered.

THERE will be always some defects in all human constitutions; and some delays will be occasioned by multiplicity of suits, and adhering to antient forms, which artful and knavish men take advantage of: but there cannot be room for any great or numerous oppressions, or malversation in the rendering justice, while there is a house of commons, which, having no part of the judicature themselves, and being of such weight as they are, and must always be, will watch over the conduct of the judges, and all who are concerned in determining of the property of subjects. So that both the security of having justice done, as well as the manner of holding property, seems to be upon as good a foundation in England as in any country in Europe; and, indeed, upon as good as (considering all things) can well be expected in any community.

[y] Plato *Repub.* p. 133.

H

TRACT

TRACT II.

Of the Right and Manner of Imposing Taxes; and of the other Privileges of the Parliament.

SECTION I.

Of the Illegal Attempts of some of our antient Kings to levy Money without the Consent of Parliament.

AS the subjects of England are thus secured from having their estates wrongfully taken from them, by any proceeding at law, so they are likewise out of danger of being exhausted, by exorbitant taxes, at the will of the crown. It is true, we are subject to taxes as well as our neighbours; and those taxes have, for some years past, been very great; but the difference to our advantage is, that, in most other countries, impositions of money are now arbitrary, and assessed at the will of the prince only; and therefore may sometimes be very oppressive: whereas our taxes, being laid by the consent of the whole nation, given by our representatives in parliament, can never be much, or, at least, not for any length of time, contrary to the real interest of the nation.

THIS privilege of not being subject to taxes, but by the consent of their representatives, was formerly common to most, if not to all the governments of the Gothic model; which provided for the support of their princes, without their having need of this prerogative of taxing their subjects. At the first settling of these kingdoms, there were certain quantities of land reserved, and assigned, to the several kings, for the maintenance of their estate and family, and for the common charges of their administration. Some of these lands were occupied by their villains, or other servants, and the product of them, or a great proportion of it, was rendered in kind. Their towns and cities were inhabited by people somewhat more free, than the occupiers of their farms; but they were obliged to render either their manufactures, or other services, upon occasion, from themselves in particular,

cular, or were to contribute to the fee-farm-rents paid by the towns in general to the crown. But most of the lands were held of the crown, by the nobility and gentry, by military service.

THE conditions of holding these lands were different, in different nations. In England, the first and second of these sorts of lands might, by law, be talliated in a reasonable way; that is, the occupiers of them, besides their constant rent, might have some payments in money assessed upon them, on extraordinary occasions, by the prerogative of the king. "They might be talliated as far as a tenth part, but not farther [a]." The third sort were liable to heriots upon the death of a tenant, to reliefs upon the entrance of a new one, to escheage, or the payment of a sum of money as equivalent for their tenants failure to perform their military service, and, in proportion to this failure, they were farther liable to occasional aids of money, for making the king's eldest son a knight, for marrying his eldest daughter, and for ransoming the king's person, when taken prisoner in war. And most of these sorts were liable to escheat to the crown, for want of issue in the possessors, or by forfeiture in the case of treason, felony, and other crimes.

THE kings had, besides these, some settled dues upon the administration of justice, for the grant of certain writs and processes under their seals. They had moreover some fines, or mulcts, in cases of crime or misdemeanor; and in the nations that bordered upon the sea, and in some others, they had some antient dues, or customs, paid upon goods exported and imported. But more than these settled and duly paid, the kings could not legally levy any money upon their subjects, without their consent. Accordingly Monsieur de Comines said, very justly, that to raise money upon their subjects, at their pleasure, was a right, that neither the kings of France, nor any other prince in Europe, at that time had; and that they who represented them as having such a right, did them no real service, for it made all people unwilling to be under their government [b].

[a] Hist. Excheq. p. 27.

[b] Is there any king or prince upon earth, who has power, besides his demesnes, and without the consent of the poor subject who is to pay it, to raise one penny but by tyrannical violence? Comines Mem. lib. p. 333.

INDEED several of the antient kings of France did, in fact, lay impositions upon their subjects, without their consent; but this was looked upon as illegal and tyrannical: and accordingly the states assembled at Tours, A. D. 1483, under Charles VIII, represented it to that prince, as one branch of the natural liberty of France, that no taxes should be levied upon the people, without the consent of the three estates; to whom accordingly the best princes of that kingdom have often applied for that purpose [c].

THE case was much the same in Spain: from the best historians of that nation, we find, that the states of the kingdom had an authority of regulating the public impositions, and controlling their kings, whenever they carried them too far. They acquaint us with the particular times when the standing taxes were first imposed; and give us instances when the grants of these taxes have sometimes been refused, upon the application of their kings. Mariana tells us, lib. xi. cap. 16. that, in the year A. D. 1176, Alphonsus, king of Castile, wanting money to carry on the siege of Cuenea, attempted to lay a tax upon the estates of the nobility and gentry; but they opposed him so vigorously that he was obliged to desist. And we have a very particular account, from the same author, that, when these grants were made by the states, they were made at first, only for a time limited. And that, though afterwards, by the negligence and want of caution, on the part of the states, they came to be granted without any determined time or proportion; yet still, in the time of Charles V, the states assembled in the several provinces, when that prince first came to the throne, made no small difficulty in granting the taxes demanded by him, and insisted upon their right to refuse them, whenever they thought fit [d].

[c] Bodinus de Rep. lib. vi. cap. 11. and Pasquier Recherches, lib. ii. cap. 6, 7, shew that in France the antient law was, that no money should be raised without the consent of the states; and how the practice came to be otherwise, Pasquier shews at large. And De Comines, lib. vi. chap. 7. p. 382, says, that Charles VII was the first that gained that point of laying taxes upon the country at his pleasure; without the consent of the states of his kingdom.

[d] See Geddes's Tracts, vol. i. p. 238. 253.

FROM

FROM these, and many other passages that might be referred to, it is plain, that, even in Castile, where the power of the crown was always higher than in most of the other provinces of Spain, the right of laying extraordinary taxes was understood to belong to the states of that kingdom, and was long exercised accordingly; as it was likewise for some time since in France. But all the claims and endeavours in these nations to preserve this right, in the great councils of their representatives, have been vain.

A LATE writer [e] says of the two kingdoms of Castile, that, "pour reduire (the people in them) à tout ce qu'on souhaite, il suffit de dire, Le roy le veut. C'est sous son nom qu'on accable ces pauvres gens d'impôts; à legard des autres royaumes où provinces, ils n'en ont pas; tant ils en vantent la pluspart d'être libres, et de ne payer la pluspart que ce qu'ils veulent." This writer seems to intimate, that the boasts of those other provinces, as to their freedom in this point, are not very well grounded: and I believe, indeed, the appearance of freedom, in their case, is more than the substance.

BUT there is reason to wonder how a native of France could make these observations, without reflecting, at the same time, upon the condition of that country; which is certainly as bad, as to taxes; and the authority of the crown, to impose them, is as absolute as it is in Spain. In a great part of France, there is not so much as a pretence of consulting the estates upon this subject; and though in some provinces of that kingdom, there is a form of the estates meeting, and the taxes they raise are called their free-gift, yet, for a considerable time past, they have been obliged to comply to give what tax the court demands, and so are reduced to a condition very little better than the rest of the kingdom [f]. The registering the royal edict for giving money, though it is done:

[e] Voyage d'Espagne.

[f] C. Boullain. *Etat de la France*, vol. ii. p. 62. says of the estates of Britany, "Le premier commissaire (du roy) fait au nom du roy, la demande du son gratuit: les commissaires se retirent aussi-tôt pour donner lieu à la délibération, qui étoit autrefois assez longue, mais à présent les etats s'accordent toujours unanimement, sans même que le corps fassent aucune délibération particuliere ou generale."

by the parliament of Paris, yet it is done only for form: they seldom oppose, and never with any effect. And, of late years, when some of the estates of that kingdom have refused to comply with the demands of the court, they have been taught obedience, by a party of dragoons. Such melancholy changes have been made in the condition of these two great monarchies. The like observations might be made of one of the kingdoms of the north at present; and Sweden, the other of them, is but lately recovered from circumstances altogether as bad.

It hath not been without great difficulty and struggle, that the people of England have all along preserved this valuable branch of liberty. After having been enjoyed, in the time of the Saxon kings [g], in as great measure as the disturbed, unsettled condition of those times would allow, at the Norman conquest, or soon after, it was grievously attacked, and almost wholly lost: it is true, that William of Normandy, by a charter, in the latter part of his reign, granted, that all the freemen of this kingdom might have, and hold, their lands free, and in peace, from all unjust exactions and tallage, so as nothing be exacted or taken, unless their free service, which of right they ought, and are bound, to perform, as it was appointed, given, and granted to them, by him, in the common council of the whole kingdom.

By this charter, they had, in reality, a right to be exempted from all but the known legal payments abovementioned, towards making the king's eldest son a knight, and towards marrying his eldest daughter, the reasonable talliages of his cities and towns in burgage tenure, the settled customs on merchandizes exported and imported, and such other extraordinary taxes as should be levied by their own consent. But both this prince, and several of his successors, practised very differently from the tenour of this grant: they revived and levied the danegild or hidage, and other taxes, which Edward the Confessor [b] had totally laid aside, in a most

[g] In the Saxon government, before the Norman conquest, extraordinary taxes could not legally be raised, by the kings, without the consent of their witenagemotes, as we find by the Saxon annals, under the years 994. 1002. 1006. 1011.

[b] Ingulph. Hist. p. 897.

arbitrary manner, and in too high proportions, by their own bare authority, or with only the advice of their privy council. They talliated their demesne lands, and their towns, in a grievous manner, and contrary to the antient laws and customs of the land; and exacted high and uncertain reliefs for the lands held of them by military service, at least for baronies [i]. They made undue advantages of the wardships, and marriages of their wards, both male and female: though Henry II declared, that he would not take any thing for the marriage of his female wards; yet this was afterwards practised by his successors. As Magna Charta only obliged them not to disparage their wards in marriage, they thought themselves at liberty to make all other advantages they could from thence: a construction so agreeable to the times, that it was immediately countenanced, and in effect established, by the statute of Merton, cap. 6, 7. They made, or suffered great wastes upon their lands; and by their sheriffs, bailiffs, and other officers, they extorted great sums of money upon those who held any thing of the crown, or were to make any payments to it: in particular they oppressed those whose lands adjoined to, or lay in the compass of their forests [k].

THESE oppressions were practised here for somewhat more than a hundred years after the conquest; and put the nation into so much ill humour, that it was ready to break out continually, and at last did so, in the reign of King John, who, to these oppressions, added other personal injuries, by corrupting the wives and daughters of divers of his subjects; so that the nation, resolving to bear with them no longer, had recourse to arms, in vindication of their liberties, especially their original right of being taxed only by their own consent, or in a legal way.

THE far greater part of the barons, supported by the generality of the people, being engaged in this enterprize, King John, seeing it would be in vain to oppose, agreed upon (A. D. 1215), and

[i] About reliefs of earldoms, baronies, and knight's service, and the uncertainty of the same, see Selden's Tit. of Honour, p. 699. 703. 725.

[k] See Charta de Foresta.

granted the following very important articles, among others, in the Great charter [1].

THAT the reliefs, for lands held of the king, by knights service in chief, should be certain, and according to the antient rate [m]. That lands in wardship should be kept without waste. That no scutage or aid “ponatur in regno nostro, nisi per commune consilium regni nostri, nisi ad corpus nostrum redimendum, et ad primogenitum filium nostrum militem faciendum, et ad filium nostrum primogenitum semel maritandum; et ad hoc non fiet nisi rationabile auxilium [n]. Præterea volumus et concedimus quod omnes aliæ civitates, et burgi, et villæ, et barones de quinque portibus, et omnes portus, habeant omnes libertates et omnes liberas consuetudines suas. Et ad habendum commune consilium regni, de auxiliis assidendis; aliter quam in tribus casibus prædictis, et de scutagiis assidendis, summoneri faciemus archiepiscopos, episcopos, abbates, comites, et majores barones regni sigillatim, per literas nostras. Et præterea faciemus summoneri in generali, per vice-comites, et ballivos nostros, omnes illos qui in capite de nobis tenent &c.” These and all the other articles of the great charter, and that of the forest, which had been granted by King John, Henry III, his son, confirmed, in the ninth year of his reign.

SOME time afterwards, indeed, Henry III, by the ill counsel of Hubert de Burg, pretended that these charters had been obtained by duress, and therefore cancelled them, in the eleventh or twelfth year of his reign. And even when he was prevailed with, after the battle of Evesham, to re-grant charters of the like nature, yet the clause in King John's Magna Charta, that no aids should be granted but by the common council of the kingdom, and several

[1] Matt. Paris, p. 244. says, that the Great charter was, for the most part, declaratory of the principal grounds of the fundamental laws of England.

[m] Wilkins, LL. p. 368.

[n] Ibid. p. 369. Sir Robert Cotton, apud Royal Treas. pref. p. 14. says, that scutage, or escuage, was an imposition not mentioned before the reign of Henry I, and continued till Richard II. It was paid out of each knight's fee, as a sort of a fine for defect of service, or one settled in lieu of service, or in the way of tax to supply the king's occasions.

other clauses of importance were omitted; accordingly the old aids were revived, and taken probably with circumstances not a little oppressive. As they also continued to be by Edward I, who not only tallaged his demesnes very heavily, by commissioners of his own, but also required military service of persons from whom it was due [o]. He obliged the ports to arm more vessels, and send them into his service, and for longer times, and on other conditions than they were obliged to do by their tenures, or by law, and took great quantities of provisions without paying for them [p]. And laid high impositions, by his own authority, upon the exportation of the chief commodities of the realm [q].

BUT the spirit of liberty, which had been stunned at the Norman conquest, having been by this time revived, it appeared with great vigour in opposition to these arbitrary practices. The earl of Hertford, constable of England, and the earl of Norfolk, earl marshall, made strong remonstrances to the king about these grievances: and when he was gone into Flanders, without having redressed them [r], those earls, with other barons, came to the Exchequer [s], attended by many of the citizens of London, whom, as Walsingham says (p. 72.) they prevailed upon to stand by them for the recovery of their liberties, and forbade the barons of the Exchequer to levy the eighth penny upon the laity, telling them that they knew nothing of it, and that taxes could not be imposed, or exacted, without their consent.

NOT long after which, these earls came to London, upon summons from Prince Edward, guardian of the realm, to meet in parliament [t], but they came guarded with five hundred horse, and a great number of choice foot, and would not enter the city before they had liberty to place their own guards at every gate: in which parliament they insisted upon, and obtained, the charter, since called the statute *De tallagio non concedendo* [u]. In this charter or statute, the Great charter and that of the Forest are

[o] See Brady's Edward I, p. 52.

[p] Ibid. p. 54.

[q] Cotton's

Posth. p. 182.

[r] Brady's Edward I, p. 57, 58.

[s] Matt.

Westm. p. 430.

[t] H. Knighton, col. 2523.

[u] Coke's 2d

Inst. p. 432. Prynn, of Pap. Usurp. p. 742. 747.

confirmed, and to be held as common law. It is declared (Conf. Chart. chap. 5.) that the aids, mises, and prises, that had been taken, should not be drawn into custom [w]. And chap. 6. that no such aids shall be any more taken, "sans de commun assent de tout le royaume, et pour le commun profit de ces; s'aves les anciens aides et prises dues et accoustumes." chap. 7. the maltot of wools is abolished; and it is granted for the king and his heirs, "que mes ces ne prendrons sans leur commun assent, et leur bon volonté. Sauve à nous et à nous heirs la custome des leyns, pealx, et quires avaunt grauntes per la communalty avant dit."

AND in the statute De tallagio non concedendo, cap. 1. it is said, "Nullum Tallagium vel auxilium per nos, vel hæredes nostros, in regno nostro ponatur seu levetur, sine voluntate et assensu archiepiscoporum, episcoporum, comitum, baronum, militum, burgensium, et aliorum liberorum comm. de regno nostro. Cap. 2. nullus minister noster vel hæredum nostrorum capiat blada, corea, aut aliqua alia bona cujuscunque sine voluntate et assensu illius cujus fuerint bona. Cap. 3. nihil capiatur de cætero nomine vel occasione maletot de sacco lane." Cap. 5. there is a pardon to Humphrey de Bohun, earl of Hertfort, and to Roger Bigot, earl of Norfolk, and to their confederates, of the transgressions which they have done, if they have done any, before the making of this charter.

THESE statutes might have seemed strong enough to have effectually established the nation's right of not being taxed, but by parliament. But still attempts, either open or covert, were for some time made against it. Hakewill of Impof. p. 51, says, that there was no practice or means, that by the policy of man could be thought of, but was attempted by Edward III, in order to bring the people under this yoke of impositions, without assent of parliament. At one time that prince agreed with the merchants, that they should pay him a certain sum upon each commodity exported and imported, by way of increase of custom: hereupon the commons complained, by petition 22 Edward III, that the

[w] See Coke's Comment. upon it, p. 528.

merchants had granted to the king 40 s. upon each sack of wool, en charge du people, et nemy des merchants. But of a practice of this kind the commons complained before [x], saying it was a great mischief, and against reason, that they should be obliged to pay dearer for commodities, by reason of a charge upon them, by the grant of the merchants [y]. And by a statute 36 Edward III. cap. 11, no subsidy, or charge, is to be granted to the king, by the merchants, without assent of parliament [z].

SOMETIMES Edward III raised money by dispensing with some statutes in force, which restrained the exporting or importing commodities. But 13 Edward III. N°. 5, this was complained of in parliament [a]. And 14 Edward III. cap. 21, there was an act of parliament against it. In farther prevention of this mischief, which continued, there was provision made in an act of parliament 27 Edward III, against all licenses to transport wool [b]. Another devise for raising impositions, without the assent of the commons in parliament, practised by Edward III, was, by way of ordinance, *i. e.* by the king and lords, without the commons. In this way it was ordained, 7 Edward III, that the merchants should yield a subsidy to the king. But this was no sooner laid than revoked [c]. In 21 Edward III, the king, in excuse of such impositions, saith, that they were laid in times of great necessity, and by the assent of the prelates, earls, barons, and other great men, and some of the commons then present: nevertheless his pleasure was, that such impositions, not duly laid, should not be drawn into consequence, but taken away [d]. Sometimes he directly made impositions by his own authority, without colouring; but this was complained of in parliament, in 23 Edward III [e]; and in 24 Edward III, that prince ordained that some extraordinary duties should be laid upon wool, for protection of

[x] Rot. Parl. 17 Edward III. N°. 27. Cott. Abr. p. 39.

[y] Hakewill, Imp. p. 52.

[z] St. John's Arg. in Rushw. vol. i. p. 501.

[a] Hakewill, p. 54.

[b] Ibid. p. 55. 60.

[c] Ibid. p. 62, 63.

[d] Rot. Parl. 24 Edward III. N°. 17. Cott. Abr. p. 53. 60.

[e] Hakewill, p. 69.

trade against the enemies. But of this also there were, very soon, complaints made in parliament.

IN 50 Edward III. N°. 163, a great complaint was made in parliament, that an imposition of a penny was made upon wools, for tonnage, over and above the antient due, which was but a penny. Also that a penny was enacted for mesonage; which before was but a half penny: and although these impositions amounted but to one hundred pounds a year, yet they were as much stood upon, in point of right, as the other great one of forty shillings [f]. In the same year of this reign, Lord Latimer, chamberlain to the king, was censured in parliament, for procuring an imposition of eleven shillings to be set upon a sack of wool; and, though he excused it by saying, that he had first the consent and good liking of the merchants, yet judgment was given against him, that he should be committed to prison, and fined and ransomed at the king's will, and be put out of the privy council. Richard Lyons, farmer of the customs in London, was, for the same cause, adjudged in parliament to be committed to prison, and all his lands and goods seized to the king's use.

BUT none of these devices practised by Edward III, had any long effect: the nation easily saw through them. They perceived that an agreement with the merchants made the charge, in the end, fall upon those that were to buy the commodities: and besides, that granting licences to particular persons would be prejudicial to trade in general. They therefore opposed each of them in parliament, at the first opportunity, and had them made void by several statutes. Nor would they submit to the impositions which the lords only joined with the crown in making: nor even to those in which some of the commons were concerned. They insisted upon it, that no authority but that of the king, and the two houses of parliament together, was sufficient to charge the subject. Accordingly, after several struggles upon this matter, Edward III, though he was very unwilling to part with the power to raise money, in this way, upon the subject, yet saw it was in vain to contend for it.

[f] Petyt, Jus Parl. p. 385.

THE people would not submit even to the loans desired of them, whatever fair promises might be made of repaying them. The commons in parliament, 25 Edward III [g], made a grievous complaint against the use of them, and prayed that from thenceforth none shall be compelled to make loans against their will. And they gave the following reason in their petition; "for that it was against reason, and the franchise of the land: and prayed that restitution may be made to those that have made such loans." To this the king's answer was; it pleaseth our lord the king that it be so.

IN 2 Richard II, it is enacted, that in loans, which the king shall require of his subjects, upon letters of privy seal, such as have reasonable cause of not lending, may thereto be relieved, without farther trouble or grief [b].

WHEN, in times of danger, the king sent writs to the ports, &c. to provide ships and men, they were commonly to be at the king's charge: but sometimes, upon necessity, they were to be at the charge of the towns and ports adjoining; which, I think, was the true cause of the complaint in parliament 25 Edward I, and the making the statute for staying that course; for there is no record of any such writ afterwards, till the time of Edward III. And then, in the 10th, 11th, 12th, and 13th, of that prince's reign, by reason of the pressing wars between him and the French, there were writs awarded to the towns to send ships sufficiently furnished at their own charge: which, I think, were the principal cause of making the statute 14 Edward III. cap. 1. And after that no such writ for ships, at the charge of the towns, was awarded till 1 Richard II. But that was grounded upon an ordinance in parliament, that all towns, which would have their liberties confirmed, should have them without fine, save only for finding a ship: so that this was, in some measure, at their will whether they would do it or not. Afterwards indeed, 1 Henry IV, there were commissions awarded to the towns to find vessels at their own charge: but this was complained of in parliament, 2 Henry IV,

[g] Rot. Parl. N^o. 16. Cott. Abr. p. 79.

[b] Cott. Abridg. p. 170.

as being against the liberty of the subjects, and the commissions were expressly repealed; and since that time, no such writs have been issued.

AFTER the abovementioned censure in parliament upon Lord Latimer, 50 Edward III, on account of laying impositions, till 4 Mary I, no king did attempt to lay any more impositions without act of parliament [i]. Though it is also observable, that upon a joint application of the lords and commons to Edward III, in his 51st year [k], that they might not be taxed, or any way charged, but by their common assent in parliament, he answered, that he was not willing to do it without great necessity, and for the defence of the realm, and when he might do it with reason; which was a sort of asserting and keeping up his claim to do it upon occasion.

BUT, notwithstanding the abovementioned claim of Edward III, at the end of his reign, the nation continued, in parliament, to insist upon their right, and would not be charged with any imposition or subsidy, but by their own consent in parliament, and this they did with so much force and effect, that very little, if any thing of that kind was practised, by the succeeding kings, for near two hundred years. During all that time, so careful was the nation to keep up a sense of its right, in this point, that several times, when the parliament granted money to be raised, by the customs or otherwise, they made protestations, that these supplies to the crown were not of duty, but free grant. And that this might plainly appear, they sometimes made suspensions, or interruptions, for a while, in the course of payment. In 5 Richard II, there was to be an interruption of the king's taking the subsidy, for a week, between the nativity, and the circumcision [l]; and the like 9 Richard II. N°. 11, for above a month, from Midsummer to the first of August. In 13 Henry IV, the commons spoke their sentiments freely, and said they gave the subsidy to the king for a year, and should always do the same; but that they did expect

[i] See Coke's 2d Inst. p. 61. and Hakewill of Impof. p. 72. 78.

[k] See Rot. Parl. N°. 25.

[l] See Cott. Abr. p. 198, 199.

that

that it should be confessed, that it proceeded from their own free will, and not from duty [m].

RICHARD II, in his 24th year, forced abundance of people to lend him money, which was one of the things that turned the trading part of the nation against him [n]. Edward IV, first made use of a way, which he styled benevolence, though it really was no better than a compulsion upon the people, to give so much money to the king, in proportion to their substance [o]. And though this practice was declared illegal, by act of parliament, in the reign of Richard III, yet it was again revived and exercised with rigour by Henry VIII. This prince, in the 14th year of his reign, collected a benevolence, notwithstanding the statute of Richard III (which he affirmed to be of no force, as made by an usurper); it was ten in the hundred of all goods, according to the extremest rate of them, revealed by the oath of the possessors [p]. And in the 15th year of his reign, by the advice of Cardinal Wolsey, he sent commissioners into every county, to persuade the people to contribute to the king the sixth part of their whole estate. Upon which the people fell a cursing, and were upon the point to rebel, had not the king, by his letters, stayed the proceedings of the commissioners; though he threatened such as withstood his authority, with convention before his counsel, imprisonment, and confiscation of goods. When he saw that this method would not serve his turn, he demanded a benevolence; and, when that was refused, he abased his gold [q]. And although this prince, by rigorously pressing this point, occasioned an insurrection, which made him desist from it; yet in the reigns of both his daughters, Queen Mary and Queen Elizabeth, the same notions of the prerogative prevailed so much at court, that Queen Mary, by her own authority, laid impositions upon cloth and other goods; which, during her life, were submitted to, and paid without contradiction [r].

[m] See Cott. Abr. p. 478.

[n] Echard's Hist. Eng. vol. i. p. 405.

[o] See Raleigh's Prerog. Parl. p. 319.

[p] Cott. Posth. p. 177.

[q] Hakewill's Impof. p. 90.

[r] Ibid. p. 93. 96. Sir John Davies of

Impof. p. 71. in the Temple Library.

QUEEN Elizabeth did not only continue the same impositions that were laid by her sister Mary, but did raise others on sundry kinds of merchandize, by the same absolute power; namely, on every ton of sweet wines, on every ton of Rhenish wines, and on every quintal of alum; which, during the time of that prudent princess, when the nation was every day threatened with destruction, and misery, were received without contradiction [s].

KING James I not only continued the impositions laid by Queen Mary and Queen Elizabeth, but also laid new impositions, over and above all customs and subsidies formerly due for the same: though the nation, during the greatest part of his reign, was at peace with all the neighbouring powers; and, except some little disturbances, which were occasioned by an uncommon stretch of the prerogative of the crown, enjoyed perfect tranquillity at home [t].

BUT the most express and avowed claim of right to this prerogative was in the reign of Charles I, who, set on by the duke of Buckingham, insisted that tonnage and poundage were due to the crown by hereditary right, without any grant from the subjects [u]; that he could justly, by his own authority, not only make impositions upon merchandizes, but also could, in cases of danger, of which he was the sole judge, oblige the maritime and even the inland counties, to find a proper number of ships, for the defence of the seas, or levy the sums of money upon them that should be requisite for the same purpose: as to all which points he obtained the opinions of most of the judges, after a solemn arguing of the case [w]. He also imposed coat and conduct money. But, in opposition to these practices, the house of commons made strong remonstrances, founded upon evident and antient facts. They shewed that tonnage and poundage, and even the customs,

[s] Sir John Davies of Impof. p. 71. in the Temple Library.

[t] See Davies of Impof. p. 73. Rapin, tom. vii. p. 141. 188. And see the judgment against Bates, Mich. 4 Jac. in the Exchequer Chamber, upon an imposition laid by King James I, upon currants, without assent of parliament, in Lane's Reports, fol. 28.

[u] Rapin, tom. vii. p. 410. 527.

[w] Ibid. p. 452. 457. and tom. viii. p. 25.

had been originally granted by parliament, first for a time, and afterwards for the life of the prince. Sir Robert Cotton says, that tonnage and poundage began 45 Edward III, and had their original by parliament [x]. And the greatest lawyers were of the opinion that there was no custom due to the king by common law, not even the custom of wool, woolfells, and leather: this custom had its beginning by act of parliament [y]. That as to ship-money, though somewhat like it had been once or twice demanded formerly, yet the nation never submitted to it. For when Henry IV, in the second year of his reign, ordered boats and ballingers to be provided at the expence of the towns, it was complained of in parliament [z].

INDEED it has been expressly declared in parliament, that the lords and commons cannot be charged with any thing for the defence of the realm, or the safe-guard of the sea, unless it be by their own will in parliament, *i. e.* in the grant of a subsidy. To which the king assented [a]. Upon the whole, they set forth that matter in so clear a light, that king Charles I, in his answer to the petition of right, found himself obliged to acknowledge, that the crown had no right to levy any money without the consent of the lords and commons in parliament.

BUT King James II, after all these declarations, took the customs, and chimney money, from the beginning of his reign, for a considerable time, without any act of parliament to authorize it. However, as that unhappy prince's behaviour gave occasion for a fresh declaration of rights, which was made in William and Mary, it is expressly declared, art. 4. "*Que toute levée d'argent pour l'usage de la couronne sous pretexte de la prerogative royale, sans qu'elle ait été accordée par le parlement, ou pour un plus long temps, ou d'une autre maniere qu'elle a été accordée, est contraire aux loix [b].*" Accordingly there never has been since, nor can be for the future, according to the present constitution, any pretension formed by the crown to the contrary: the par-

[x] Posthu. p. 172.

[y] Coke's 2d Inst. p. 59.

[z] See Hamden's Trial.

[a] See Hale of Parl. p. 87. and Rot. Parl. 13 Henry III. N°. 10.

[b] See Rapin and Echard's Hist. Revol. p. 266.

liament is uncontestably vested with the sole right of levying money.

AND this our lawyers understand, not only of actual impositions of taxes, but of all other methods that amount to the same thing; particularly, it is held for law, that the king cannot now raise, or diminish, the value of the coin, so as to endanger the property of the subjects, without their consent in parliament. A certain author [c] observes justly, that the coin of any nation can never be corrupted or embased, or, which is the same in effect, have a nominal value put upon it, higher than its true value, without great inconvenience. And that he had great reason for saying so, appears from the grievous experience which France, his own country, has had of the effects of those arbitrary valuations. "Les peuples, sous le regne de Philippe le Bel, avoient à souffrir
" d'extremes vexations. L'une de plus grandes fut le changement
" des monnoyes. On les avoit fait trop foibles de bas alloy, et de
" trop haute valeur. On les voulut rabaisser. La perte y étoit
" grande. Le peuple de Paris s'en mutina [d]; le mal dura sans
" amendement jusqu'en l'année 1306, et fut porté à tel excès,
" qu'en la premiere année du 14 siècle, un denier de l'ancienne
" monnoye en valoit trois de la nouvelle: par où il paroît que le
" roi (Philippe le Bel) avoit réellement fait profit de deux parts
" sur trois par la nouvelle fabrique [e]." We have formerly had the same thing often practised in England. Henry I. A. D. 1125,
" mutavit subinde monetam, unde cara omnia; et gravissima
" secuta fames [f]." He was followed in this by Stephen, and others of his successors [g]. Henry III, in his 33d year, being in great want, borrowed large sums of money of his brother Richard earl of Cornwall, and coined new money in most cities and large towns, out of which he fully paid his brother, and gave him one half of the profits of the coinage, which made him vastly rich [h].

[c] Bodin de Rep. p. 608.

[d] Mezeray. Abr. tom. i. p. 496.

[e] C. Boul. tom. iii. p. 67. et ibid. p. 391, sous Philippe Valois.

[f] Spelm. Henry I. p. 308.

[g] Tyrr. in Stephen, p. 229.

[h] Kenner's Paroch. Antiq. quotes Wikes's Chron. A. D. 1149.

BUT one of the most remarkable alterations in the coin was made in Edward the Third's reign, by William Edington bishop of Winchester, treasurer of England, who, loving the king's commodity more than the wealth of the whole realm, caused new groats and half groats to be coined, less by 5 s. in the pound than the sterling value; whereby victuals and merchandizes became dearer through the whole realm [i]. In A. D. 1411, Henry IV, caused a new coin of nobles to be made, of less value than the old, by 4 d. in the noble. And in the year 1465, Stow tells us, that Edward IV, caused a new coin, both of gold and silver, to be made, by which he gained much: for he made of an old noble, a royal: nevertheless, to the same royal was put 8 d. of allay. And so of other coins, after the same proportion, to the great damage of the commons. Edward IV, in the 5th year of his reign, abased his gold; and in the year 1544, Henry VIII caused base money to be coined, such as pieces of 12 d. 6 d. 4 d. 2 d. and 1 d. in weight as the late sterling, and, in appearance, good silver, but inwardly copper. This base money, for the time, caused the old sterling to be hoarded up; so that 21 s. was frequently given for an old angel to guild withall [l]. Also lands and tenements, with the prices of victuals, were raised far beyond the former value.

HENRY VIII abased his coin more than the one half of its value: such an abatement as never, before or since, was heard of, and could not but be very grievous to the people; but, because they held it lawful so to do, they made no complaint against it [m]. Indeed the practice of this prerogative hath not been forborn by any of the kings of this realm; and some of them have used it very immoderately: yet we do not find any one public complaint upon record against it, for the reasons abovementioned [n]. Several proclamations were issued out, in Edward the Sixth's reign, for sinking the value of the coin one third part, and sometimes one half [o]. And in Queen Mary's reign, A. D. 1556, a proclamation

[i] See Stow's Survey of London.

[k] Hakewill of Impos. p. 85.

[l] See Fleetw. Chron. Pret.

[m] Hakewill of Impos. p. 91.

[n] Ibid. ibid.

[o] Strype's Eccl. Mem. vol. ii. p. 247.

was issued out, for raising the currency of the testoons above their intrinsic value [p]. Queen Elizabeth, in the 44th year of her reign, altered and debased the Irish coin; which is greatly complained of by Mr. Camden. But the Mirror of justice says [q], that, according to the antient Saxon constitution, changes of this sort in the coin ought not to be made, without the assent of parliament; and Lord Coke was also of the same opinion [r].

BUT some of our lawyers, of those times and since, have been of the opinion, that the king, by virtue of the prerogative, might lawfully make such changes, and that he was the sole judge of the expediency of so doing. Sir Thomas Smith, in his treatise on the English Commonwealth, represents it to be the king's right, to put what value he pleases upon his coin. And Sir Robert Cotton says [s], that he was not of opinion, with the Mirror of justice, that the king cannot abase his coin without assent of parliament. Even Lord Chief Justice Hales says [t], "It is true, that the embasing of money, in point of allay, hath not been very frequently practised in England; and it would be a dishonour if it should: neither is it safe to be attempted without parliamentary advice. But surely, if we respect the right of the thing, it is in the king's power to do it."

Now so far the opinion of these lawyers may be right, that, by our antient constitution, the executive power of fixing a value on the coin was solely vested in the king. For one of the Saxon laws says, "nemo officinam aliquam monetariam habeat præter regem [u]." Hence, therefore, it is highly probable, that, by our antient constitution, the crown was trusted with the executive power of ascertaining the value of money. But then it was, on the other hand, undoubtedly intended, that the king should do it for the benefit, and not for the ruin, of his people. For it was always a maxim in law, as lord Coke says [w], that the law hath so admeasured the prerogative of the crown, that it cannot justly

[p] Strype's Eccl. Mem. vol. iii. p. 311.

[q] Cap. 1. sect. 3.

[r] 2d Inst. p. 576.

[s] Posth. p. 289.

[t] Hist. Pleas

of the Crown, vol. i. p. 193.

[u] Wikes's Chron. p. 118.

[w] 2d Inst. p. 36.

injure any one, unless its doing so may be for the public service. And therefore when Henry VIII and other kings embased their coin, greatly to the damage of the people, they acted arbitrarily and illegally; and the best of our kings thought so, consulted with their parliaments, and acted by their advice in this case.

Rot. Claus. 6 Henry III, dorso m. 14, there was an assize de monetâ made by commune concilium nostrum. Chronic. Thomas Wikes says, ad A. D. 1247, "Facta est generalis congregatio omnium magnatum Angliæ, episcoporum, comitum, baronum, coram domino rege apud Oxon [x], quindenâ Paschæ, quorum consilio et assensu dominus rex mutavit monetam suam, quia vetus sic fuit retonsa quod nullius fuit valoris. Prohibitio capiendi monetam retonsam." Pulton's Statutes tell us, 51 Henry III, that, by the consent of the whole realm of England, the weight of the money was determined. And the same author tells us, that in the statute called Articuli super chartas, 28 Edward I. cap. 20, several ordinances were made concerning the standard of gold and money, and to punish those that act contrary thereto. 2 Henry V. Rot. N°. 12, it is enacted, that the king, by his council, shall have power to make ordinances touching the coin, to endure till next parliament [y].

THE standard of money remained nearly the same in the kingdom, from 6 Edward IV, till A. D. 1524, in the reign of Henry VIII, who then first debased the money, by mixing it with brass, to the very great injury of the subjects, and no less disreputation of that prince [z]. But the late great work of remedying the ill state of the coin has taken away all pretence from the crown, of raising or lowering the value of our money, either in weight, fineness, or denomination [a].

As the crown cannot break in upon the property of the subjects, by raising or sinking the value of the coin, so neither can it do it by granting patents for monopolies [b]. Lord Coke defines a

[x] Gale's Scrip. xv. vol. ii. p. 47.

[y] Cott. Abridg. p. 539.

[z] Strype's Annal. vol. i. p. 265.
his life, pref. to his 3d vol. p. 24.

[a] Letter to W. Moyle, Esq; in
[b] Generally all monopolies are against
Magna Charta, because they are against the liberty of the subject, and the law of the
land, Coke's 2d Inst. p. 47. 63.

monopoly to be an institution by the king, by his grant or commission, or otherwise, to any person or corporation, of and for the sole buying, selling, making, working, or using of any thing, whereby any person or corporation are sought to be restrained, of any freedom or liberty they had before, or hindred in their lawful trade. The like definition of monopolies is made in the preamble of act, 21 James I. cap. 3, concerning monopolies. Patents for such monopolies were formerly granted, by several of our kings; though they were of very ill consequence to trade, and oppressive to the subject. In the latter end of the reign of Edward III, John Peach, of London, purchased a patent, under the great seal, containing that he only might sell sweet wine within the franchises of the city of London; and, by colour thereof, he took 4*s.* 4*d.* of every man, for every ton thereof sold [c]. But for this he was censured in parliament, 50 Edward III [d]. And in 3 Richard II. N^o. 18, John Imperiali, an agent sent hither by the republic of Genoa, had procured a monopoly, to furnish England with all such wares as came from the Levant; and kept his staple for that purpose at Southampton: but he was killed, upon this account, by Kirby and Algar, two citizens of London [e].

RICHARD II, and others of our kings, granted licenses to some merchants, to transport goods to different parts from what were appointed by act of parliament; upon condition they should pay a sum of money for that liberty. To the merchants of Newcastle, Richard II gave leave to carry wool-fells, &c. to any port besides Calais, then by statute appointed for the staple town, on condition, that they should pay for them such custom and subsidy as should be thought reasonable by the king's council. And Henry VI, in his 6th, 21st, and 30th years renewed the same licenses; and granted 600 sacks of wool to a merchant of Florence, with a non obstante to any statute or restraint. In this reign such licenses were so frequent, that the town of Calais complained, in parliament, of their decay thereby; but I do not find that it obtained any relief.

[c] Cott. Abr. p. 122.

[d] Ibid.

[e] Prynne's Lords, p. 369.

EVEN so late as the reign of Queen Elizabeth, there was great complaints of monopolies. "I cannot utter with my tongue, or conceive with my heart (says Sir Francis Moore, in the house of commons) what the town and county, for which I serve, suffereth by some of these monopolies. Monopolies bring the general profit into a private hand, and the end of all is beggary and bondage to the subject. Out of the spirit of humiliation I speak it, there is no act of her majesty's, that is more derogatory to her, more odious to the subject, and more dangerous to the commonwealth, than the granting these monopolies [*f*]." Mr. Dernland said, "If we proceed by way of petition, we cannot have a more gracious answer than we had the last parliament, about monopolies; but, since that time, we have heard of no reformation: I never heard the cry of monopolies greater or more vehement, than at present [*g*]."

NOTWITHSTANDING the distressed situation of a great part of the nation, by means of these monopolies, was so loudly complained of, the crown was by no means willing to suffer that part of its prerogative to be touched, or intrenched upon. The Lord Keeper Egerton said, in parliament, in 1597, that, as to monopolies, her majesty hoped, that her dutiful and loving subjects would not take away her prerogative, which is the principal flower of her garden; but that they will rather leave that to her disposition. As her majesty has already proceeded to the trial of them, so she promiseth to continue, that they shall all be examined to abide the trial, and true touchstone of the law. Some others of her counsellors spoke in a higher strain. "One gentleman, said Sir Robert Cecil, went about to possess us with the execution of a law in antient record, 5 and 7 Edward III, likely enough to be true, when the king was afraid of the subject. In former times all sat together, as well the king as the subject; and then it was no prejudice to his prerogative to have such a monopoly examined." If you stand upon the law, and dispute the prerogative, hear what Bracton says [*h*], *Prærogativam nostram nemo audeat disputare.*

[*f*] Dews's Journal, p 645.

[*g*] Ibid. p. 646.

[*h*] Ibid. p. 649.

I have heard myself, being in my coach, these words spoken aloud : ‘ God prosper those that further the overthrow of these monopolies : God send that the prerogative touch not our liberty.’ I will not wrong any one so much as to imagine, that he was of this assembly ; yet let me give you this note, that the times were never more disorderly, and men are too apt to make ill interpretations of good meanings : I think, that these persons would be glad that all sovereignty was converted into popularity.” Sir Francis Bacon, in like manner, declared strongly, in the house of commons, upon this subject, that the commons ought not to deal, or judge of, or meddle with, her majesty’s prerogative [i].

BUT, at length, the remonstrances and complaints of the house of commons had some effect. Queen Elizabeth, in her 44th year, published a proclamation, declaring those grants to be null and void, and leaving them to be tried at common law. And, in a speech to a committee of parliament, she said, “ I would rather lose my heart or hand, than that either should consent to allow such privileges to engrossers, as may turn to the damage of my people [k].” Though still the crown went on to grant monopolies, as appears by several set on foot, in the time of James I, by the king’s letters patents.

BUT, to put an end to all grievances of this kind, there was an act made against monopolies, 21 James I. chap. 3, by which it is declared, that all monopolies, &c. are altogether contrary to the laws of this realm ; and so are, and shall be, utterly void, and of none effect ; and in nowise to be put in use or execution. And that all such grants of monopolies, &c. shall be ever hereafter tried according to the common laws of this realm, and not otherwise. The party grieved, by such grants or monopolies, shall recover treble damages and double costs, by action in the courts at Westminster. And whoever stays, or procures judgment to be stayed or delayed upon such actions, shall incur a præmunire. The crown can only grant exclusive patents, for fourteen years, to new manufactures and inventions.

[i] Dews, *ibid.* p. 645.

[k] Camden’s Elizabeth, p. 642.

By which statute, one should imagine, all such hindrances to trade, and such chargeable and oppressive vexations to the subjects, were effectually removed. But, in the reigns of Charles I and Charles II, were there not several patents granted, in the way of monopolies, equally detrimental to trade, and oppressive to the subject, with any of those heretofore so much complained of?

It is farther held, by our lawyers, that the crown hath not a right so much as to create any new offices, with salaries annexed to them to be paid by the people. This is a way of raising money that has been often practised in other countries of Europe: it has been done very much in France, and has brought in great sums of money to the crown. “*Les coffres de l’épargne étant vuides, il falloit avoir recourse au plus fascheux moyens pour recouvrer de l’argent, particulièrement à la création de nouveaux offices, dont les Italiens fournissent les titres, et le roi, Henry III, de France, persuadoient que cette multiplication étoit un excellent moyen d’avoir de l’argent sans violenter personne, et de rendre la puissance du roi plus absolüe en remplissant toutes les villes des creatures qui fussent à lui, et qu’il tint obligées, par la crainte de perdre leur charges, de lui aider à fouler leurs sujets [1].*”

THIS practice went the more easily down in France, because that people, as De Comines observes, love to be in office, but it is in its nature productive of many and great inconveniences; for it encourages extortion and many other kinds of outrages. And as it is, in effect, a way of raising money and burdening the subject, who must bear the charge of such officers, without their consent, in parliament, it hath not been submitted to in England, when attempted on the part of the crown.

KING Edward III, had granted to Robert Poley, of Norwich, a new office for measuring of worsteds, with a new fee; but it was, at the petition of the commons, resolved, in parliament, to be void, and afterwards was revoked by the authority of parliament [m]; and the like is the law in all cases, says Lord Coke [n].

[1] Mezeray, Henry III. vol. iii. p. 1130.

[m] Cott. Abr. p. 71.

[n] 2d Inst. p. 534.

There was a petition, in parliament, to the like purpose, 13 Henry IV [o]; where the commons complain that an office was erected for measurage of cloths and canvas, with a new fee for the same, by the authority of the king's letters patents, and pray that these letters patents might be revoked; for that the king could erect no offices with new fees to be taken of the people, who cannot legally be so charged but by parliament. The king's answer, in parliament, was, that the statutes heretofore provided, for this purpose, shall be observed: which statutes were 25 Edward I, and 34 Edward I, &c. and accordingly judgment was also given in the King's Bench: so that this point was both resolved, in parliament, and adjudged by law, according to these statutes [p].

ACCORDINGLY, by 12 Car. II. cap. iv. sect. 7. it is enacted, that the customers, collectors, and all other his majesty's officers, in the several ports, concerned in the receipt of the customs, shall receive only such fees as were taken in 4 James I, until such time as the said fees shall be otherwise settled, by authority of parliament. And by 12 Car. II. cap. 32. 34. his majesty is authorized to nominate and appoint such, and so many, commissioners, and subordinate officers, for the management of the excise, as he shall think proper: and by sect. 33. of the said act, all the said commissioners and officers are to be sworn to take no fee or reward, for the execution of the said office, from any other person than from his majesty, or those whom his majesty shall appoint in that behalf. These provisions implied that, without parliament, no offices could be created by the crown, that would be either immediately, or in consequence, burthensome to the subjects.

[o] Cott. Abr. p. 482.

[p] Lord Coke's 2d Inst. p. 333.

S E C T. II.

Those Methods of Levying Money that were antiently deemed Legal, are, at present, abolished; and that Power, with the Disposition of the Money raised, is vested in the Parliament.

HAVING set forth some of the illegal methods, that many of our antient kings pursued, for the raising of money, by their own authority, without the assent of parliament, I shall proceed to point out some other practices, which they pursued for the same purpose, which were no less oppressive to the subject, though, in those days, they were deemed legal, and which, at present, we have happily got rid of. And herein I shall begin with *purveyance*, an oppression, in former ages, so big that all other oppressions seemed to be swallowed up in that one. This was originally, without doubt, a legal right in the crown; being of a like nature with some prerogatives still enjoyed by foreign princes: it was intended for the making more plentiful and choice provision for the households of princes, and for their better accommodation when they travelled, in those ages in which accommodations requisite were not very easy to be met with [q].

BUT this branch of the prerogative was antiently so used as to be uncommonly oppressive to the subject. We find some traces of it before the Norman conquest [r]. Canute says, “*Omnibus hanc porro impertimus alleviationem, ut quo prius opprimebatur onere, populum liberemus. Imprimis, præfectis meis omnibus mando, ut ex prædiis meis propriis, quæ mihi fuerint ad victum necessaria, suppeditent; neque alius quisquam victui nostro alimenta præstare invitus cogatur* [s].” Henry I, with the advice of archbishop Anselm and that of his council, endeavoured to redress several grievances, which the people of this nation had suffered in the reign of his brother William Rufus. And to regulate the great abuses of the purveyors, which had so

[q] See Bacon's Govern. of Eng. part i. p. 166.

[r] LL. Canut. cap. 67.

[s] Coke's 2d Inst. p. 542.

much distracted the government, and oppressed the people [t]. But the regulations of this prince were not carried into execution, or did not answer the end proposed; for we are told by Lord Coke [u], that, before the statute of 28 Edward I, the insolence of the purveyors, bearing themselves so proudly under the great officers of the king's household, grew to that height, that they would take what, and as much as, they pleased; and many times where it might least be spared, and for others than for the king's household; and sometimes would pay nothing, and many times less than the true value: and many persons would make purveyance without any warrant at all.

In order to prevent these grievances, which are also recited and acknowledged in the statute *Articuli super chartas*, cap. 2. the famous statute 28 Edward I, was made. But this law had not the desired effect; for in 11 Edward II, there was a complaint, that divers following the court, "*bona subditorum, nomine regis, et hospitia captant.*" And in the same year it was ordered, that no man shall take "*victualia aut alia mercimonia contra voluntatem possessorum, nisi prius soluto precio* [w]." But in 13 Edward III, the commons, in parliament, desired that the purveyors, though with the king's commission, might be arrested, if they did not pay for what they had. And again, the 17th of this reign, the commons desired a remedy against the outrageous takings of the purveyors: to which the king answered, that the statutes should be observed. And in the 18th, 25th, and 36th years of this prince, there were statutes made to restrain the violences of the purveyors: and another in 1 Richard II, another 7 Richard II, and another in 4 Henry IV. Yet it seems as if they all signified but little; for in 5 Henry IV, two fifteenths were granted, in parliament, upon condition that the purveyors should not take their goods and carriages against their wills.

BUT, even after this grant, we find the commons, 8 Henry IV, praying payment for victuals taken by the purveyors, due since the time of the king's coronation; and the very next year, the speaker

[t] Spelm. in Henry I.
Government, part ii. p. 38.

[u] 2d Inst. p. 543.

[w] Bacon of

of the house of commons, in parliament, complained against the abuses of purveyors. In 1 Henry VI, there is a printed statute against them. Another 11 Henry VI, and another 23 Henry VI. However these grievances continued to much later times; for the house of commons complained to King James I, that there was a general extreme, unjust, crying oppression practised by cart-takers and purveyors; who have ravaged and ransacked the country, since your majesty's coming among us, far more than under any of your royal progenitors [x].

THE advantage arising to the crown from purveyance, as to saving household expences, was, in 35 Elizabeth, estimated, communibus annis, at 25,000 l. per ann. in 3 James I at 40,000 l. per ann. and in the reign of Charles I, at near 50,000 l. per annum [y]. Some persons were of the opinion, that this prerogative was inseparable from the crown, so that it could not be taken away. Lord Coke and Sir Robert Atkins say it is, in express terms [z]. And so does Sir Robert Cotton. And Fabian Philips, in Charles the Second's time, wrote a long treatise, in which he professes to shew the antiquity, and, among other things, the necessity of it.

BUT, happily for the nation, the members of the first parliament after Charles II was restored were of a different opinion, and were able to prevail upon that prince to consent to give it up. Accordingly, by Charles II, the right to purveyance in the crown was entirely abolished, except as to particulars necessary for the accommodation of the king in his progresses. And though the abolition of this right of purveyance may seem to have been chiefly of advantage to the lower kind of people, as farmers, &c. who were most exposed to the takings and oppressions of the purveyors, yet, in reality, it affected even the highest people; whose lands being rented by these farmers, if the latter were oppressed, they were so much less able to pay their rents.

ANOTHER very considerable advantage which we have gained over our ancestors is, that the king cannot billet or quarter any

[x] Hale of Parl. p. 233.

[y] Phil. Govern. of Eng. p. 262.

[z] Disp. Power. p. 54.

soldiers,

soldiers, or other persons, upon private houses, unless by the free consent of the owners. Of what advantage it is to be exempted from this burthen, any person may judge, either from his own imagination of the inconveniences of it, or from the accounts we have of them as suffered in other countries. The account we have from the states of France, assembled at Tours, of the miserable condition of the poor farmers of that kingdom, will not give us a bad idea of this matter. “Les gens de guerre sont souldoyez pour le defendement de l’oppression: et ce sont ceux qui plus l’oppressent. Il faut que le pauvre laboureur paye et souldoye ceux qui le battent, qui le delogent de sa maison, qui le font coucher à terre, qui le otent sa substance. Mais ils sont plus malheureux, car l’homme de guerre ne se contentera point des biens qu’il trouvera en l’hôtel de laboureur, ains il le contraindra à gros coups de baton, où de voulge, à aller querir de vin en la ville, du pain blanc, du poisson, espicèrie, et autres choses excessives, et, à la verité, si n’ étoit Dieu qui conseille les pauvres et leur donne patience, ils cherroient en desespoir.”

SUCH was the blessed state of the poorer sort of people in that kingdom in former ages; and if any person thinks that nothing of this sort has been done in France of late years, I desire he would only enquire of what passed in those provinces of that kingdom where the protestants resided, in the reign of Lewis XIV. And I doubt not but he will hear of still greater oppressions and barbarities, from the logements of the dragoons, than these I have mentioned above. Indeed, the subjects must be at all times liable to them, where this power of free quartering soldiers, upon private families, is in the crown, unrestrained and unregulated by any laws.

In England, we had no standing armies antiently, nor quartering soldiers in time of peace; so that there was no provision made for quartering any at common law, or by any statute that I know of. Yet sometimes our kings did thus oppress the people. In the two first reigns after the Conquest, it seems to have been practised to give free quarter, in private houses, against the will of the owner. For Henry I, in his charter to the city of London, exempts them thenceforth

thenceforth from that burthen. “*Neque de meâ familiâ nec de aliâ, vi, alicui hospitium liberetur [a].*”

IN the reign of Edward III, the commons, in parliament, complained of being oppressed with the free quartering of soldiers [b]; and in 8 Henry VI, the commons petition that all such soldiers, as pass through the realm, do pay for their victuals and lodging. To which the king answered, that he would be advised [c]. And in the reign of Charles I, this quartering of soldiers was not only practised, but that in such a degree, that the house of commons complained loudly of it to the king [d]; that, in apparent violation of the antient and undoubted right of all your majesty's loyal subjects of this your kingdom in general, and to the grievous and insupportable detriment of many countries and persons in particular, a new and almost unheard-of way hath been invented, and put in practice, to lay soldiers upon them, scattered in companies here and there, even in the heart and bowels of the kingdom, and to compel many of your majesty's subjects to receive and lodge them in their own houses, and both themselves and others to contribute towards the maintenance of them; to the exceeding great detriment of your majesty, the general terror of all, and the utter undoing of many of your people [e]. And the same author observes, that in 2 Car. I, the soldiers broke out with great disorders, they mastered the people, disturbed the peace of families and the civil government of the land: there were frequent robberies, burglaries, rapes, rapines, murders, and barbarous cruelties. And unto such places as did not tamely submit to the counsellors of this prince (though there was very little opposition to the measures of the court at that time) the soldiers were sent for a punishment; and, wherever they came, there was a general outcry: the highways were dangerous, and the markets unfrequented. But in opposition to these practices, the commons, in parliament, affirmed, that every subject of this kingdom had a full property in his goods; and, in the petition of right, they demanded it, as their known

[a] Brady of Burghs, Append. p. 26.

[b] Brady's Edward III. p. 239.

[c] Cott. Abr. p. 595.

[d] Rushw. vol. i. p. 548.

[e] Rushw.

vol. ii. p. 424.

freedom, to have the soldiers and mariners quartered upon any private persons, contrary to their consent, withdrawn, to which the king answered, "Soit droit fait comme il est désiré [*f*]."

By a clause in an act of parliament 31 Charles II, it is declared and enacted, that no officer, civil or military, nor other person whatsoever, should from thenceforth presume to place, quarter, or billet any soldier or soldiers, upon any subject or inhabitant of this realm, of what degree, quality, or profession soever, without his consent. And the quartering which is now allowed upon public houses, victuallers and the like, is only by virtue of a clause in the mutiny act, which is made every year, and expires at the end of it; so that it is entirely at the will of the parliament whether this power shall be continued in the crown or not: and in all the mutiny acts, provision is made, that the provisions given to the soldiers and their horses, so quartered, shall be paid for duly at settled rates. In a word, there is, at present, no way left for the crown to raise money upon any of the subjects, except by consent of parliament. And when money is to be raised upon the subjects, all bills for that purpose must take their rise in the house of commons; who can best judge, and are most concerned to judge, what things it is most for the convenience of the people to have the taxes laid upon: and who are always willing to receive petitions from them, or to hear reasons from their representatives, against any bill that is likely to bear too hard upon the subjects in general, or upon any particular part of them.

THE house of lords, though they can reject a money bill in the whole, yet cannot make any alterations in it, or at least not so as to increase the sum given. And, in this particular, the commons have always been jealous of their privileges; for we find, in Rot. Parl. 9 Henry IV. N^o. 21. [*g*] a complaint of the commons, of a breach of privilege, in that the lords several times acquainted the king with what passed in parliament about a subsidy, before it was agreed upon. And 16 Car. I, it was resolved, that the lords voting the propounding and declaring the matter of supply, before

[*f*] Rapin, vol. vii. p. 379.

[*g*] Cott. Abr. p. 465.

it was moved in the house of commons, was a breach of privilege of the house [b]. There have been instances formerly, when the lords have given money for themselves and their tenants, separate from the subsidy of the other commons. For 13 Edward III, the lords granted the king the tithe of all the corn growing upon their demesnes; and the commons granted nothing [i]; or, at least, their aid was conditional [k]. 12 Edward IV, the lords spiritual and temporal, by themselves, granted to the king the tenth part of one whole year's revenue of all and singular their possessions: while, at the same time, the commons granted to the king 14,000 archers, to serve the king, at their costs, for one year; the same to be levied out of all men's lands, according to proportion [l].

BUT of late, there has not been any attempt made by the lords to make any separate grant of that nature: so that the sole right of giving rise to money bills, and determining the amount of the sums to be raised, seems to be allowed to the house of commons. The parliament, at present, in granting money, does for the most part appropriate it to particular services, whereby the application of it is the more effectually secured. This was likewise done formerly, upon some occasions. 1 Richard II, there was an appropriation of a subsidy given, to the use of the war only: and Philpot and Walworth were appointed receivers and keepers of it to that use [m]. And in the latter end of the reign of Edward III, there was such another appropriation either made, or requested, by the commons [n]. 5 Richard II, a subsidy of tonnage and poundage was granted, upon condition that it should be applied for the sea-service, and for no other purpose. 6 Henry IV, the commons appropriated the subsidies they granted to the use of the war, and appointed Lord Furnival and Sir John Pelham receivers and keepers of the money for that use [o]. This caution however was not often observed, except in cases where bad or weak management was suspected from the crown or its ministers.

[b] Rushw. vol. ii. p. 1147.
Abr. p. 19.
p. 146. N^o. 20, 21.

[i] Ibid. p. 688.

[o] Ibid. p. 438.

[k] West. Peers, p. 9.

[m] Ibid. p. 156.

[k] Cott.

[n] Ibid.

BUT, since the Revolution, the method of appropriations hath been generally introduced: which naturally secures the right application of the money, and gives a right of enquiring whether this appropriation has been duly observed, and of making any alteration that may be afterwards found proper and expedient. And when money is granted by parliament, the commissioners who are to be employed in raising it, are, in case of the land tax, named by the house of commons itself: a circumstance which was thought of no small importance, by the states of France, when they had the privilege of raising money. They then always named their own commissioners [p].

AT present, in France, the king having obtained that right, there are great complaints made of the oppressive practices of those who are concerned in levying the royal revenue. “Un collecteur impose à un homme à la taille deux ou trois fois au de la de son revenu comment se pourvoir. Il faut payer par provision les trois ou quatre cens ecus, à quoi est taxé un homme qui n’en possède pas la moitié de revenu. Apres, un peut se pourvoir. C’est à dire monter de barreau en barreau jusque à une cour souveraine; plaider trois ou quatre ans, consumer en frais de justice trois fois autant que vaut le principal; et au bout de tout cela ne rien retirer. Car ceux qui manient les affaires du roi, et qui exercent ses droits, ont toujours raison [q].” This account may possibly be somewhat aggravated; but that it is not altogether without foundation appears from a writer less to be suspected, who represents to the king of France, “that the avarice of the farmers of taxes is such, that, provided they can fill their pockets, they care not how much they expose the glory of your name [r].”

HERE in England, the right of naming and appointing commissioners for taxes was antiently in the crown, and was commonly exerted by it [s]. In the aid which was granted to Henry III, when Magna Charta was passed, there is the form of the commission [t]; and in the other grants which came afterwards, the

[p] See Pasq. Rech. de la Tailles, and Vauban’s Dixme Royale.

[q] Les Soupirs de France, part ii. p. 17.

p. 322.

III, in dorso.

[s] See Brady of Burghs, p. 30.

[r] Test. polit. de Colbert,

[t] Rot. Parl. 29 Henry

king is desired to issue out his commissions for the levying them as customably [*u*]. The commissioners, by those commissions, had power to examine all men upon oath, as to the true value of their estates [*w*]. In the most antient times, the tallages were usually imposed and set by the king's judiciars, in their respective iters; but afterwards by commissioners appointed by the king for that purpose.

BEFORE 8 Edward III, there were two chief taxors appointed by the king, in every county; who appointed twelve in every hundred, to rate every man's personal estate, according to the true value; and then to levy such a part of it as was granted in parliament. These chief taxers also appointed such, and so many as they thought fit, in every city and town of the king's demesne, to enquire into every man's personal estate in those places, and to levy such part thereof as had been granted, in parliament [*x*]. And that they might value every man's estate truly, these taxers were sworn not to do otherwise for love or hatred. But 8 Edward III, there was complaint made to that prince, by parliament, that the taxers and collectors, for bribes, spared some men, and, by colour of their office, extorted from others more than they ought to pay, and applied it to their own use. Whereupon there were commissioners sent by the king through all England, to settle and agree with the several cities and burghs, what they should pay respectively, for tenths and fifteenths, &c. which sums were fixed upon the particular cities and burghs respectively for the future, and were made the standards of all future taxations [*y*]. 21 Edward III, the commons complained, that divers extortions and grievances were done to the people, by the collectors of wool, and the taxers of other tallages and their deputies [*z*].

THOUGH still the chief taxers and commissioners were named and appointed by the crown, yet, 25 Edward III, the commons petitioned, that none of their house might be made collectors of

[*u*] Rot. Parl. 6 Richard II, N°. 16. *ibid.* 2 Henry IV. N°. 9. and *ibid.* 4 Henry VI. N°. 12.

[*w*] Madox's *Hist. Excheq.* p. 503. [*x*] Brady of Burghs, p. 39.

[*y*] *Ibid.*

[*z*] Cott. Abr. p. 62.

the aid granted. But the king denied their request [a]. However, they petitioned for the same thing, 45 Edward III, but still in vain. But in the 51st of this reign, the king granted their request [b]. Commissioners, for levying the aids granted by parliament, were appointed and named by the crown, 34 and 37 Henry VIII, 2 and 3 Edward VI, 4 and 5 Philip and Mary, 15 and 22 Charles II.

BUT at present, and since the Revolution, the power of naming commissioners, for the land tax, is exercised only by the house of commons yearly, in the act by which that aid is granted. These commissioners must be persons of some figure and credit in their several counties; the qualification to act in that capacity being 100 l. per ann. in that county where they act. Their knowledge of each other's fortunes, and their neighbourhood, will dispose them to act equitably by each other. And as these provisions are made for the ease of the subject, in raising the land-tax, so in all other impositions upon goods, the like care is taken to prevent any grievance, as much as may be. The king has indeed the nomination of the commissioners of the customs and of the excise; and by them, or by the commissioners of the treasury, he can nominate all the subordinate officers of each: and the commissioners of excise have a judicial authority, in some cases, without any appeal, but to the commissioners of appeals, also nominated by the king; or in the country to the justices of the peace, at their quarter sessions, who are also named by the lord chancellor.

HOWEVER, their methods of proceeding are so far prescribed by parliament, and they are so much under its eye and correction, that there is no room for any great grievance or oppression. Nor have we, in fact, hitherto heard of any committed by them; though the extension of the excise laws, and thereby depriving English subjects of that antient and constitutional method of trial by juries, which has stood the test of so many ages, and been one of the great bulwarks of our liberties, will always be looked upon with that horror and detestation which it deserves. But, I hope,

[a] Cott. Abr. p. 79.

[b] Ibid. p. 148.

this will never be attempted; and in every other case there is as great care taken for the ease of the subject, in regard to levying of money granted, as can well be, consistently with preserving the rights of the crown: at the same time, that the right of giving money is now unquestionably settled to belong to the parliament only.

S E C T. III.

Of the Times for the meeting of the Parliament, its Privileges, and the Order and Effect of its Proceedings.

IN consequence of this unquestionably-established right, that no money can be raised but by the authority of parliament, the nation has a greater and more effectual security, than it would otherwise have, of annual meetings of its parliament. Indeed it is not very clear whether, by the laws now in force, the nation is entitled to a session of its parliament, more than once every three years. For though, perhaps, it was in pursuance of the antient constitution or custom of the realm, that an act of parliament was made in 4 Edward III, providing, that there should be a parliament held once every year, or more often if need should be: and though this act was enforced with another in 36 Edward III. stat. 1. cap. 10. rather more expressive than the former, because the clause "if need be" was left out; yet these acts were not much observed from the beginning.

DURING the Saxon constitution, we are informed, from the Mirror of justices, chap. 1. sect. 3. that "pur le estate del royalme
" fist le roy Alfred assembler les comitees, et ordeigne pur usage
" perpetuelle que à deux foits par l'an où plus souvent, pur mestier
" en tempts de peace, se assembleront à Londres pur parlementer
" sur le guidement del people de Dieu, coment gens se garderent
" de peche; viverent en quiet, et receiverent droit per certaine
" usages et saints jugements. Per cet estatute, se fierent plusieurs
" ordinances par plusieurs roys jusque al ore roy: quelles ordi-
" nances

“ nances sont difuses per moin sages ; et pur default que elles ne
 “ sont my mise en escript, et publies en certaine.” And in chap.
 5. sect. 1. it is further said, that “ Abusion est que où les parle-
 “ ments se duissent faire pur le salvation des almes des trespaffors
 “ et ces à Londres, et deux foits per an. La ne se font ils ore
 “ forsque rarement, et à la volunt le roy par aides et cuilets de
 “ trefore, &c.” Many other authors were of the same opinion [a] ;
i. e. that, before the Norman conquest, it was established by law
 for parliaments to be held twice a year. But, on the other hand,
 many learned men have thought, that there is no great force in
 either of these authorities, for the proof of this point.

BECAUSE, in the first place, parliaments, in those ages, were
 held at other places as well as at London. Particularly King
 Ethelstan, who was not long after Alfred, held great councils or
 parliaments at Grately, Exeter, Feversham, Thunderfield, and
 Thitlanbirig, as well as at London [b] ; which appears from his
 laws which we have extant. Now he would hardly have done so,
 had there been any exprefs law of Alfred's, as the Mirror says,
 that London should be the only place for holding parliaments.
 But, secondly, there is reason to doubt whether the author of the
 Mirror, who lived in the time of Edward II, had ever seen such
 a law, as he mentions, of Alfred's. Because, if any such law had
 been known in that time, it would probably have been quoted by
 the lords ordainers, in 3 Edward II, who, in the 29th article of
 their ordinances, appoint, that the king shall hold a parliament
 once every year, or twice if there be need: they would probably
 have alledged such an antient law, had they known it, to give
 countenance to their new ordinances. Or, it is not improbable
 that the author of the Mirror, finding that Alfred had made several
 regulations in the policy of this nation, and that among others
 he had appointed two general shire-gemotes, or general county
 courts, every year, he understood those meetings to have been par-
 liamentary conventions. For, in fact, this very mistake has been

[a] See Sir Robert Atkyns of Parl. p. 59. Bishop Atterbury's Rights &c. of a
 Convocation, p. 31, 32.

[b] Hody's Convoc. p. 68.

made by some modern authors, from the law of Edward the Confessor, (tit. de Greve) which law, though they represent it as speaking of parliamentary conventions, yet really means nothing more than full county courts [c].

HOWEVER, though there be no sufficient evidence that there was ever any law for annual parliaments, there is evidence enough that there were such parliamentary assemblies held frequently at the king's court, on the three great festivals of Christmas, Easter, and Whitsuntide. Even in the Saxon times, the great men used to appear at court, on those solemn occasions, in state, to pay their duty to the king [d]; and, when the feasting was over, they often used to assemble in a parliamentary way, to consider any business that wanted to be dispatched. And this custom continued, after the Norman conquest, till the reign of Henry II, from whence forward it was by degrees laid aside.

So that the nation had been antiently used to parliamentary meetings; and therefore it is no wonder, that when they came to be too little practised, and grievances arose thereupon, which could have no remedy, the nation should petition for, and obtain, remedy by the law, 4 Edward III, for frequent parliaments. The petitions of the commons, in parliament, in 50 Edward III, and 1 Richard II, that parliaments might beholden every year, plainly implied that they had not been so holden. Nor have they been more exactly observed in most of the succeeding times; at least not since the reign of Henry VII. For, from his time, to that of William III, there have been, in most of the reigns, intermissions of holding parliaments for several years together. On this account, some persons have thought that our kings all along looked upon it, as the right of their crown, to judge whether there would be need of a parliament every year or not; and that the clause "if need be" was intended to refer this matter to their judgment [e]. And, indeed, the answer made by Richard II, to the petition of the

[c] Kennet's Eccles. Synods, p. 222. and Wake's State of the Church, p. 135, 136.

[d] See Hody of Convoc. p. 58. who quotes several antient authors to prove this point.

[e] See duke of Buckingham's speech, in Echard's Hist. Engl. p. 413. Burnet's History of his own Times, vol. iii. p. 401. *ibid.* vol. ii. p. 106.

commons for annual parliaments, in the first year of his reign, as it is represented in Cotton's Abridgment of the Rolls of Parliament, may seem to intimate that prince thought so. For there he is made to say, that as to holding a parliament every year, let the statute made for the same be held, but the king will have his pleasure: which expression seemed to imply, that he was a judge whether a parliament ought to be held or no, even though that statute was allowed to stand in force.

BUT when we see, in the rolls at large, the true answer of this king, there is no colour for putting this interpretation upon it. The petition of the commons was, that "*plése à notre dit seigneur de tenir parlement un foitz per an, meynz et ceo en lieu convenable [f].*" To which the king answered, "*quant a ceo que parlement seroit tenuz chacun an soient les estatuts ent fait tenuz et gardez. Mais quant à lieu où le parlement se tendra le roy eut sa volonté;*" which plainly implies, that the former was not his will. Agreeably to this, amongst the causes for which the parliament, in 2 Richard II, was called, the bishop of St. David's, by the king's command, declared this for one [g], "*se- condement pour ce que autrefois à la priere des seigneurs et communes estoit ordaignes et assentrez que parlement serroit tenuz chacun an; mesme nostre seigneur le roy veillant tout dis faire tenir tout bonne covenant, et mettre en execution chacun ordinance fait en ses parlements, si ad il purtant fait semondre parlement.*"

THESE passages shew clearly enough, that the king knew it to be the design of those acts of Edward III, that a parliament should, without fail, be held every year; and not that the king should determine whether it would be convenient to hold one or not. For if that had been all, the acts would have been made to no purpose: as the king had the same authority before those acts were made, and consequently the end of making them was plainly to ascertain the advantage the nation would receive in having a yearly parliament. But whatever the succeeding princes came to think

[f] Rot. Parl. 1 Richard II. N°. 95.

[g] Ibid. 2 Richard II. N°. 4.

of the statutes, they did, in fact, as I have already observed, shew but little regard to them. And their lawyers seem to have informed them, that they were not obliged to have any; for the Lord Chief Justice Finch, in the trial of Hamden [b], said, that the king is not bound to call the parliament but when he pleaseth. And Charles I [i], published a proclamation, in which, among other things, he says, that “whereas, for several ill ends, the calling of another parliament is divulged, his majesty declares, that the late abuse having, for the present, driven his majesty unwillingly out of that course, he shall account it presumption for any to prescribe any time to his majesty for parliaments; the calling, continuing, and dissolving of which are in the king’s own power.”

AFTER this and many other attacks of the like kind, the nation came to be so little sensible of the force of those acts of Edward III, though known to be unrepealed, that the act for triennial parliaments, 16 Charles II, even while it refers to those statutes, goes no farther than to declare, that the setting and holding of parliaments shall not be intermitted, or discontinued, above three years at the most: “but that within three years from and after the determination of this present parliament, and so, from time to time, within three years, after the determination of any other parliament or parliaments, or if there be occasion, more or oftener, your majesty, your heirs, and successors, do issue out your writs for calling, assembling, and holding another parliament. To the end that there may be a frequent calling, assembling, and holding of parliaments once in three years at the least.” Which plainly implies that the intermission of the fitting of parliaments, for less than three years time, was not contrary to law; but that the crown, if it thought proper, might legally so practise: for if it had been judged contrary to law, it certainly would not have been so much as tacitly permitted by an act of parliament.

ACCORDINGLY when it was moved, in the house of lords, A.D. 1677, that the prorogation of the parliament, made in 29 Charles II,

[b] P. 200.

[i] Rushw. vol. ii. p. 3.

for fifteen months, was contrary to the statutes of Edward III, abovementioned, and an illegal procedure, this motion was overruled, and the authors of it even committed to the tower. And none of the subsequent statutes have made any farther regulation in this particular: for the act for triennial parliaments, in 6 William and Mary, chap. 2, enacts only, that a parliament shall be holden once every three years at least; and the act for septennial parliaments, 1 George I. stat. 2. chap. 38, leaves this matter as it was before. So that, upon the whole, as the statutes, relating to this matter, have been understood, and practised, it is not very clear whether the nation be intitled to any more than one session of parliament, and that as short as the king pleases, once every three years.

BUT the circumstances of our nation are such at present, and are likely to be such for the future, that they will cause a necessity for the parliament's meeting, and sitting to do business, some time in every year. For the money necessary for paying the forces by sea and land, for providing for the navy, the ordnance, and other emergent national charges, is now wholly dependent upon parliamentary provision; and that provision is made but for one year, at a time; so that before another year comes on, there will be a necessity for a session of parliament to renew this provision. Besides, if any troops are kept on foot in time of peace, a legal authority of punishing, in a summary way, by martial law, for the preservation of discipline, and preventing mutiny and desertion among them, will be requisite; as also an authority to dispose the troops into fit quarters.

FOR to exercise these authorities, unless they be given by parliament, is declared to be contrary to law, by the petition of right, 3 Charles I, and by the declaration of rights, 1 William and Mary, art. 6, and many times since, in the preambles to the statutes made yearly against mutiny and desertion; so that without such authority the troops cannot legally be billeted even upon public houses. Now the acts of parliament that grant this power to the crown are made only for one year, and expire at the end of it: hence therefore it is evident, that, if the law be duly regarded,
there

there is, and will be, a necessity for a meeting of the parliament, and of their sitting to do business, some time in each year.

AND when the parliament is met, though indeed the time of their session depends upon the king, yet they have in their own hands the means of engaging him to continue their session as long as the national interest appears to them to require it. For they are at liberty to treat upon whatever business they think proper, and to make whatever applications to the crown they think fit, before they grant any supplies, or the other necessary powers abovementioned.

IN former times, the crown has prescribed to them both the order of their proceeding upon business, and the nature of it. “Le roi (Edward III) voet que toutes maneres des petitions, et autres singulieres besoignes demoergent en suspenſe, tanque cette soit mys à bon fin [k].” Again, “Le roi (Richard II, par son chancellier Mich. de la Pole) vous commande (viz. les Seign. et les Com. en Parl.) qu’ayant due consideration à les neces- saires matieres à vous demonstrez, et à les importables mischiefs apparant; vous voulliez communer diligeaument sur les matieres et remedies busoignables, à tout le haste que vous pourrez oustant de tout le communement d’autre matiere collaterale quelconque en le moyen temps. Et postea tout autre impertinente matiere mise à derriere pour le tems [l].” And, in this same prince’s reign, Tresilian and other judges, being consulted whether, if the king proposed articles of business for the parliament, the lords and commons were not obliged to go upon those articles first, declared that they were; and that if any one presumed to act contrary, he was to be punished as a traitor [m].

AND when, in opposition to this assumed prerogative of the crown, the commons have formerly claimed the right of treating matters in what order they pleased, they could not gain that point. For in 2 Henry IV, the commons declared, that it was

[k] Rot. Parl. 47 Edward III. N^o. 2. and Brady’s Edward III. p. 296.

[l] Rot. Parl. 7 Richard II. N^o. 2.
Attainder, p. 90.

[m] See West, of Bills of

not the use that they should grant any subsidy before they had answer to their petitions; and prayed the observation of it from henceforth. The king required a conference with the lords; and at the last day of parliament it was answered, that there was never any such use seen, but that the commons should first make an end of all other things, which use the king meant not to alter. And so late as Charles the First's time, this point was much disputed between the court and the house of commons [o].

AND they were not only under some restraint as to the order in which they were to treat of business, but also as to the nature of it. Some points they were not allowed to meddle with, unless the crown gave them leave. For instance, when Thomas Haxey, clerk, in the parliament, 20 Richard II, delivered a bill to the commons, against the multitude of bishops and ladies who lived in the king's household, and were chargeable to it; desiring that the bishops might be obliged to reside upon their dioceses, and the ladies to go to their own estates: and also complaining of a tax of 4*d.* in the pound, laid by the pope, last year, upon the clergy of the diocese of Canterbury, against the regalty of our lord the king, to the destruction of the clergy, &c. [p].

THE king, being informed of the bill, was very much offended, telling the lords that the commons had thereby committed offence against him, his dignity and liberty; which he willed the lords to declare the next day to the commons: and his majesty commanded the duke of Lancaster to charge Sir John Buffie, speaker of the house of commons, upon his allegiance, to tell the duke the name of him who had delivered the bill to the commons. Soon after, the lords had a conference with the commons, and declared to them the will and commandment of the king; and pursuant thereto the commons delivered the bill, with the name of Thomas Haxey the exhibiter of it, unto the lords, which was given to the clerk of the parliament. All this being done, the king prevailed so far with the lords as that it was declared and adjudged, Feb. 5. That if any one, of what state or condition soever, should move

[n] Cott. Abr. p. 406. N°. 23.

[o] See West, on Attainder, p. 91.

[p] Rot. Parl. 20 Richard II. N°. 15.

or excite the commons of parliament, or any other person, to make reformation of or in any thing which concerned the king's person, his government, or regalty, he shall be held as a traitor.

AND thereupon, Feb. 7, Thomas Haxey was brought before the king, the lords temporal, and the commons, in Alba Camera; and the bill being read, it was demanded whether he delivered the said bill to the commons, or no. He answered he did, "et intentione suâ propter honorem et proficuum regis, ac dominorum, et totius communitatis regni." But this was not admitted as a good plea; and judgment was immediately given against him as a traitor. The prelates protested against this proceeding, and prayed the king to pardon Haxey, as far as to his life, and to grant them the custody of him: which the king did, and Haxey, after the parliament was ended, got a full pardon.

It is true, that this whole procedure against Haxey was reversed in a parliament held 1 Henry IV. Rot. Parl. N^o. 9. He therein set forth, that he had been "de volonté du dite Richard II," adjudged a traitor, "en contre droit et la course quel avoit usse devant en parlement," and prayed the king to cause the record and process of that judgment to be erased and annulled as erroneous. And this was done by the king "de l'avis et assent de tout les seigneurs espirituelx et temporelx," and Haxey was fully restored to his blood, fame, and estate.

MOREOVER, 1 Henry IV [9], this judgment was enforced with a petition of the commons, in parliament, who declared, that the judgment against Haxey had been contrary to the antient customs of the commons, in parliament; and therefore they pray that Haxey might be restored in honour and estate, as well for the sake of justice, as for establishing the liberties and privileges of the commons. To which petition of the commons the following answer was given: "The king, by the advice and assent of all the lords spiritual and temporal, declares, that the said judgment given against the said Thomas Haxey, Clerk, soit de tout cassé, reversez, adnullez, et tenuz de nul force ne d'effect, et que dit Thomas fut

[9] Rot. Parl. N^o. 104.

"restitut

“restitut à les noun et fam, et fait et tenuz persone hable en manere
 “come il fut devant le dite jugement.” But though the commons gained this point in favour of Haxey, and at the same time made a declaration in behalf of their own privileges, yet the crown did not understand this to be a permission to them to treat of what matters they should think fit: for when the commons, in parliament, 11 Henry IV [r], petitioned the king that half the profits of the benefices of such clergymen, as resided not upon them, might be applied to the king's use; the king answered, that this matter belonged to the church.

IN Edward the Sixth's time, the commons asked leave to treat on some particular points. This evidently appears by their own journal, the words of which are as follows, “18th Nov. 3 Edward VI, it is ordered, that Mr. Speaker, and such members of this house as are of the king's privy council, shall be suitors to know the king's pleasure, if, upon their humble suit, the house of commons may treat of the last relief for cloaths and sheep, at four o'clock in the afternoon. And Nov. 30, Mr. Controller reporteth, that the king's majesty is pleased with the petition for the relief, and giveth license to treat upon it [s].” In Queen Elizabeth's time, the commons were, by her order, restrained from treating on some points. “If any bill relating to matters of state, or reformation in causes ecclesiastical, be exhibited, says the speaker, I am commanded, upon my allegiance, not to read it [t].” January 21, in 23 Elizabeth, the house of commons, having appointed a fast day, Mr. Vice-Chamberlain, by the queen's command, shewed to them her great admiration of the rashness of the house, in attempting, and putting in execution, such an innovation as a fast, without her majesty's privity and pleasure first known. The house agreed, that Mr. Vice-Chamberlain should carry their submission to her majesty.

ON Saturday 24th Feb. 35 Elizabeth. Mr. Peter Wentworth, and Sir Henry Bromley, delivered a petition to the lord keeper, therein desiring the house of lords to be suppliants, with the house

[r] Rot. Parl. N°. 70.
 p. 449.

[s] Hale of Parl. p. 101. Atterbury of Conv.
 [t] Dew's Journal, p. 470.

of commons, to her majesty, for entailing the succession of the crown, whereof a bill was already drawn by them. Her majesty was highly displeased with this proceeding, ordered them to be summoned before the privy council, and Wentworth was committed to the Tower; and Sir Henry Bromley, Mr. Stephens, and Mr. Welch the other knight for Worcestershire, to whom Bromley had imparted the matter, were committed to the Fleet [u]. And when the house was moved to apply to the queen for their liberty, nothing appears to have been done in it [w].

KING James I said, in council, that the right of the commons to deliberate upon state affairs is, by the words of the writ, restrained to "*quibusdam arduis negotiis*," *i. e.* to such as his majesty shall consult them upon [x]. And on Tuesday 4th December 1621, that prince, in a letter to Sir Thomas Richardson, speaker of the house of commons, says, "These are therefore to command
" you to make known, in our name, unto the house, that none
" therein shall presume henceforth to meddle with any thing con-
" cerning our government or deep matters of state; and namely,
" not to deal with our dearest son's match with the daughter of
" Spain, nor to touch the honour of that king, or any other of
" our friends and confederates: and also not to meddle with any
" man's particulars, which have their due motion in our ordinary
" courts of justice [y]."

THIS sudden stretch of the prerogative, and at a time when the nation seemed to be threatened with great danger, was very alarming to the commons, who thereupon made a protestation, "that
" the liberties, franchises, privileges, and jurisdictions of parlia-
" ment, are the antient and undoubted birth-right and inheritance
" of the subjects of England; and that the arduous and urgent
" affairs concerning the king, and the church of England, and
" the maintenance and making laws, and redressing of mischiefs
" and grievances, which daily happen in this realm, are proper
" subjects of council and debate in parliament." This protesta-
" tion was so opposite to the high notions of prerogative which in-

[u] Petyt, Jus Parl. p. 260.

[w] Dew's Journal, p. 470.

[x] Rapin, tom. vii. p. 179.

[y] Petyt, Jus Parl. p. 280.

fluenced the court at that time, and so very disagreeable to the king, that he, in the presence of his privy council, tore it out of the journal-book of the house of commons, with his own hands. Yet the commons were not discouraged by that proceeding, but still insisted that freedom of debate was their antient and undoubted right and privilege, though they were often restrained by the arbitrary power of many of our former kings: and, at length, the house of commons was acknowledged to be entirely at liberty as to treating both whatever matters, and in whatever order it thinks proper. Though the king's speech, at the opening of the parliament, is commonly employed to suggest the chief matters, which the crown thinks proper for the deliberation of parliaments at that time, yet the houses are not confined only to those matters: none of any sort are exempted from their cognisance.

THEY can take into consideration any business whatever, ecclesiastical as well as temporal. And they cannot only treat of every thing, in whatever order they think proper, but they can do it with freedom; the king cannot either put any force upon them, or threaten them. And as they are free from any restraints, on the part of the king, as to treating of any business, so likewise are they free from any tumultuous petitions, that may be made to them, by the people, to hinder their freedom. This is prohibited by 13 Car. II. stat. 1. cap. 5. which declares that no person shall solicit, or procure, the hands or consent of more than twenty persons to any petition, complaint, remonstrance, or the like to the king, or to either, or to both houses of parliament, for the alteration of matters established by law, in church or state; unless the matter thereof has been first consented to, and ordered by, three or more justices of the peace, or the major part of the grand jury of the county, at their assizes or quarter sessions; or, in London, by the lord mayor, aldermen, and common council.

SECONDLY, It is enacted, that no person shall repair to the king, or to either or both houses of parliament, on pretence of petitioning or the like, accompanied with above the number of ten persons, under any penalty not exceeding 100*l.* and three months

months imprisonment, without bail or mainprize. Provided this act shall not extend to either house of parliament going to his majesty, nor to debar any number of persons, not exceeding ten, from presenting any public grievance or complaint to any member of parliament after his election, or even to his majesty, for remedy thereupon to be had.

AND not only the right of the whole house, to treat of any matters, is sufficiently established, but also the right of each particular member to be, at all times, present, and assist at all debates that come before the house, and to speak in them, and vote, as freely as he thinks proper; subject only to the judgment of the house of which he is a member. Our kings formerly took upon them to restrain some persons, with whom they were displeased, or apprehended opposition from them to their measures in parliament, from appearing there for that purpose. Edward III, in the 4th year of his reign, denied the then archbishop of Canterbury entrance into the house of lords, till he had answered certain articles objected against him in the Exchequer: and even afterwards continued to refuse him entrance, till he was admitted upon the intercession of the lords[*z*]. Bishop Gardiner, in Edward the Sixth's time, complained, in a letter to protector Seymour, of his being denied the privilege of assisting in parliament [*a*]. Mr. Wentworth, in Queen Elizabeth's time, was forbidden to come to the house of commons, and was even confined. Sir Edwin Sandys was treated in like manner, in King James the First's time. The earl of Arundel was, in King Charles the First's time, committed, by the king, to the tower of London, during the session of parliament, and detained there, for some time, without any other reason assigned than his having done some misdemeanor against his majesty [*b*]. And, in the same reign, the earl of Bristol had his writ of summons sent to him, but it was accompanied with a letter from the lord keeper, signifying to him, that it was the king's pleasure that he should not come to parliament.

[*z*] Philips, of Govern. p. 417. Elsyng, of Parliaments, p. 27.

[*a*] Coll. Eccles. Hist. vol. ii. p. 233. [*b*] Elsyng, of Parl. p. 151.

BUT both houses of parliament having, in those cases, and in others of the like nature, applied so vigorously to the throne for the release of their respective members, and liberty for them to attend in parliament, that they always obtained these requests; it is accordingly, at present, fully established as a right, that no member of either house can be detained from the service of it, or at all imprisoned, except he be charged with either treason, felony, or breach of the peace; and, in the last case, will not, or cannot, give sufficient sureties for his future good behaviour. In any of these cases indeed, because the welfare of the public requires that persons charged with these great crimes should be secured, if they deserve it; it is therefore allowed, that any member of parliament charged with them, upon sufficient evidence, and upon oath, may be committed to prison, until he shall be tried and discharged in the ordinary course of law.

BUT these are the only causes for which the members can be legally imprisoned. In regard to which the privilege of the house of commons is now much better secured than it was in former times. For though all the peers were, by virtue of their peerage, ever held to be exempted from any attachment or arrest on account of civil actions, yet this privilege was not thought to extend to the members of the house of commons. This appears from two writs now extant [c], which were issued out by Edward II, in the 8th year of his reign, reciting that the suits of law, in which the members attending parliament were engaged, might not go to their disadvantage, on account of their absence, and therefore requiring his justices to forbear proceeding to take affizes against them. These writs, though very reasonable in themselves, were not regarded in the following reigns, or deemed sufficient to entitle the commons to the privilege of not being impleaded at law, during the session of parliament. Nor, indeed, did they expressly claim the privilege of not being impleaded, in their petition, in parliament, to Henry IV, regni 5. Rot. Parl. 71. in the following words: Item, “*priount les communes que selon la cuetume du royaume, seigneurs, chivalters, citizeins et burgeises, à*

[c] See Prynn's 4th Reg. 834.

“ vos parlementz de vostre commandement venantz, illeques de-
 “ murrantz, et à leur propres retournantz, et leur homes et servantz
 “ ave eux en le dit parlement de soutz vestre especial protection et
 “ defense, ne devoient, pur ascun dette, account, trespass, où autre
 “ contract queconque, estie arrestuz, où en ascun manere empri-
 “ sonnez en la mesme temps, et ja soit ensi que sovent foitz plu-
 “ sours de autiels homes venantz à vos parlementz et autres leur
 “ homes et servantz durant le dit parlement ont esté arrestuz per
 “ ceux qui ont eu plein conifance que ceux ensi arrestuz furent
 “ de parlement, où des homes et servantz de ceux de parlement,
 “ come est dit, en contempt de vos, grande damage de partie, et
 “ retardation des besoignes de vos parlementz; plaïse establier que
 “ si ascun desorereavaunt face arrester ascun tiel home venant al
 “ parlement come est dit, ou ascun de leur homes et servantz en le
 “ dit parlement, où eux demurrantz, durant le parlement, ou ascun
 “ chose attempt encontre la custume, face fin et rauncian à votres,
 “ et rende al partie greve, ses dammages à treble. Resp. y a
 “ sufficient remede en le cas.”

THEY did not, I say, herein expressly claim the privilege of not being impleaded, during parliament, but only of not being arrested and imprisoned; and even that the king did not directly or fully grant them. Nor did the judges in the following times admit it to be their due in all cases. On the contrary, the suits against them, in time of parliament, were suffered to proceed so far as even to judgment; in consequence of which members of the house of commons were, in several instances, taken in execution. And when they were so, the judges held that they could not be set at liberty, by a writ of privilege, nor by any thing less than a special act of parliament [d]. In 8 Henry VI. Rot. Parl. N°. 57. William Lark, who was servant to William Milrede, member of parliament for London, was condemned in a suit for 208*l.* 6*s.* 8*d.* before the summons of that parliament, in execution for which, he was taken in the time of the session of parliament, and committed to the Fleet. On the petition of the commons, in parliament, a special act was made for his releasement, saving to Margery

[d] Prynne's 4th Reg. 742.

Jaccynes, at whose suit he was taken, the execution of the said judgment against him, at the end of the parliament.

In like manner was Walter Clarke, member for Chippenham, 39 Henry VI [e], set at liberty by a special act of parliament. This gentleman after his coming to parliament, and during the session of it, was arrested, at the king's suit for 40 l. at the suit of Robert Basset, for 40 marks, in an action of trespass; and at the suit of John Payne for 20 l. for an action of maintainance, and was committed to the Fleet: and, after he was so committed, he was outlawed at the suit of the said Payne. Hereupon the commons, in parliament, petitioned that, by act of parliament, the king would order his chancellor of England to direct a writ to the warden of the Fleet, for the delivery of Clarke, that he might attend his duty in parliament; saving harmless the chancellor and warden of the Fleet, and saving to the king, and to Basset and Payne, their executions against Clarke, to be had after the dissolving that present parliament: to which the king agreed. This therefore was a special act of parliament.

BUT in the 31st and 32d of this reign [f], the commons were not so successful; when a request was made by certain members of the house of commons, pursuant to an order of the whole house, to the king and the lords spiritual and temporal, in behalf of Thomas Thorpe, who was speaker of that house, as well as one of the barristers of the Exchequer, and also of Walter Bayle, another member of that house. Thorpe was sued in the Exchequer, by the duke of York, during the vacation of that parliament, for a trespass, committed while the parliament was sitting, against the duke; and the duke obtained judgment against him for 1000 l. damages and 10 l. costs, for which he was arrested and imprisoned. The commons prayed that Thorpe, "*par le boon esloit du dit parlement,*" might be enlarged and set at liberty. The lords advised with the justices, whether the said Thorpe ought to be delivered from prison by privilege of parliament. The judges answered, that it did not belong to them to determine about the

[e] Prynne's 4th Reg. 747.

[f] Ibid. 678, &c.

privileges of parliament; but as for the practice of the lower courts in such cases, if any member of parliament was arrested, and not for treason, felony, or surety of the peace, or for a judgment had before parliament, that then such member should be released from such arrest, and make an attorney, so that he may have liberty to attend upon parliament. But as Thorpe was arrested for a judgment had before parliament, *i. e.* during the vacation of parliament, the lords would not set him at liberty; but obliged the commons to chuse another speaker; which they did accordingly, and the king accepted him.

In the case of Donne against Walshe, 11 and 12 Edward IV. (Prynne 753) in a writ of privilege, brought by Walshe, it was recited that neither peers nor knights, citizens nor burgesses, coming to parliament, &c. ought to be *arrestari*, aut *implacitari*, for any trespass, debt, account, or contract, &c. But Donne denied that there was any such accustomed privilege for commoners as *non implacitari*; and the barons of the Exchequer, upon consulting with all the other judges, adjudged that there was no such privilege, and therefore disallowed the writ.

THE like case with this, mutatis mutandis, was that of Ryver versus Cosyns, 12 Edward IV. The latter brought the same writ of privilege, as being servant to a member of the house of commons, which was in like manner disallowed by the barons of the Exchequer [g]. William Hyde, Esq. burgess for Chippenham, in 14 Edward IV. Rot. Parl. N^o. 55. was, after his coming to parliament, arrested, by a cap. ad lat. and carried before the justices of the King's Bench, and by them committed to Newgate in execution, for 69*l.* at the suit of John Marshall citizen of Exeter, and also for 4*l.* 6*s.* 8*d.* in which he was condemned to Thomas Gay Junior, citizen of London. The commons petition, that, by act of parliament, the chancellor may direct a writ to the sheriffs of London for his enlargement, so that he may attend the parliament, that neither the chancellor nor the sheriffs may be

[g] See Judge Jones and Mr. Noy's opinions against the claim of *non implacitari*. Prynne, *ibid.* 812. 815.

hurt for so doing, and that Taylor and Gay may have their several executions against him after the dissolving this parliament: to which the king consented.

BUT a more particular case than either of the foregoing is that of John Atwyll, citizen, in parliament for Exeter, 17 Edward IV [b]. This gentleman was like to have been taken in execution, during the session of parliament, upon which he attended, at the suit of John Taylor, who had obtained judgment against him by default, in eight times twenty pounds: the said John Atwyll daily attending the parliament, and not having any knowledge of the said judgment. Whereupon the commons, in parliament, pray the king, in his behalf, that an act of parliament may be made for his security in returning home; and that the barons of the Exchequer may be authorized to issue writs of supersedeas of all the writs issued against him; saving to John Taylor his execution of the said judgment, to be had against Atwyll, after the end of this parliament: to which the king agrees. What made this case more observable than any of the preceding ones, was, that the commons in their petition affirm, "that, time out of mind, it has
 " been usual, for the knights of the shires, citizens of the cities,
 " burghesses of burghes, and barons of the Cinque Ports, of this
 " your realm, called to any of the parliaments, of your noble pro-
 " genitors or yours, among other liberties and franchises, to have
 " and use this privilege, that any of them should not be empleaded
 " in any action personal, nor be attached, by their person or goods,
 " in coming to any such parliament, there abideing, nor from
 " thence to their proper home resorting; which liberties and
 " franchises your highness, to your lieges, called, by your autho-
 " rity royal, to this your high court of parliament, for the cities,
 " burghes, and Cinque Ports, of this realm, which, by your au-
 " thority royal, at the commencement of this parliament, you
 " have graciously ratified and confirmed, to us your said commons
 " now assembled, &c." And the king answered, "le roi le voet." And yet, on the other hand, there is a saving for John Taylor's

[b] Rot. Parl. N°. 35. and Prynne 771.

execution against Atwyll, though obtained during the session of parliament, and without the said Atwyll's knowledge, to be had against him after the dissolution of the parliament. This seems as if this judgment and execution was thought valid, and what were not to be vacated.

BUT whatever their sentiments were in that case, this matter has been since more clearly settled, in the remarkable case of George Ferrers, 34 Henry VIII. This person, having been elected burgess for Plymouth, in Devonshire, in going to the parliament house, was arrested, in London, by a process out of the King's Bench, at the suit of one White, for the sum of 200 marks, and carried to the Counter in Breadstreet. Upon notice of this arrest given to Sir Thomas Moile, knight, then speaker of the house of commons, and to the house, it was ordered that their serjeant should go to the Counter, and require the delivery of Ferrers to him, in order to his attending the service of the house. The sheriffs of London, encouraged, it is likely, by the judges opinions and the practice of parliament, with regard to executions, not only refused to deliver Ferrers, but maltreated the serjeant. Upon the serjeant's complaint of this, to the house, they went in a body to the house of lords, who, judging the contempt to be very great, referred the punishment thereof to the order of the commons house. Hereupon the commons sent their serjeant again to the Counter, without any writ or warrant, to demand Ferrers, and to summon the sheriffs, and their clerks and officers, to attend the house of commons; who did so; and, for their contempt, the sheriffs were committed to the Tower of London, their clerks to a little cell there, and their officers to Newgate. After two days confinement there, they were discharged, but not without making humble submission to the house. And in regard, that, in delivery of Ferrers out of execution, he could not be retaken again upon the same judgment, whereby his creditor was without remedy for his debt; therefore they deliberated upon making an act of parliament to revive the execution of the debt against one Welden, who was the principal debtor, and discharge Ferrers of it, who

was

was only his security. Upon this there was a division in that house, which however was carried for Ferrers by fourteen votes.

THE king, being advertised of all this proceeding, called before him immediately the lord chancellor of England, his judges, the speaker of the house of commons, and others of that house; and, having first commended their wisdom in maintaining the privileges of the commons, which he would not have to be infringed in any point, he said that Ferrers only, as he was his majesty's own servant, was intitled to privilege of parliament; and that whatever injury is offered to the meanest member of the house of commons, is to be understood as done against his majesty's person. He said moreover, that the person who sued Ferrers, knowing him to be intitled to privilege, was worthy to have lost his debt: but he commended their equity in giving him remedy against Welden; and this proceeding, says he, may be an example to others not to attempt any thing against the privilege of parliament. Sir Edward Montague, then lord chief justice, confirmed what the king said by divers reasons; however the act did not pass, because the parliament was dissolved before the lords had time to consider of it.

FROM that time forwards, the house of commons has continued to exert the same authority they then assumed, in vindication and maintenance of their privileges, which they have even extended farther than was then allowed. For, during the reigns of Mary, Elizabeth, James I, Charles I, Charles II, and James II, there are numerous precedents of their accounting it a breach of privilege, if any subpoena, citation, or other process, without attachment, was served upon any of their members, or their servants: Or if any suit at law was carried on against any of them, the speaker wrote letters to the judges to stay the trials, and committed the suitors against them [i]. In 1 James I, indeed, the commons had a new contest, about their privileges, with the warden of the Fleet, in case of Sir Thomas Shirley, much of the like nature with that of Ferrers. Sir Thomas, chosen a member, had been

[i] Lex. Parliam. p. 386. 391.

arrested four days before the sitting of the parliament; and the house of commons ordered that he should be brought to their house, by a *Habeas Corpus*; but the warden of the Fleet denied to execute it, or to deliver his prisoner; and, persisting in his denial, was committed, by the house, to the Tower; and afterwards to the dungeon there. But, at length, he did deliver Sir Thomas Shirley, and after he had made his submission to the house, and paid his fees, he was discharged [k].

In vindication of these and the like privileges, the commons have generally used the ready way of sending for offenders, by their serjeant, and committing them to his custody; and obliging them, before their discharge, to pay their fees: to which they have sometimes added fines, more or less, according to the offence. Which proceedings have always proved effectual to maintain the dignity and privilege of that house.

BUT as this great extent of privilege of parliament, which secured both the members of the house of commons and their servants from being at all sued or impleaded at law, as well during the session of parliament as a considerable time after every prorogation, and as much before the re-assembling of parliament, was found to be a grievance to the other people of the nation, by stopping the course of justice, and hindering them from receiving their just debts from members of both houses; hereupon it was provided, by the statute 12 and 13 William III. that any peer, or member of the house of commons, may be sued, in any court of law, after the dissolution or the prorogation of any parliament, till a new one shall meet, or the same shall be re-assembled: and likewise after the adjournment of both houses, for above fourteen days, till they re-assemble. But no peer shall ever be arrested, nor any member of the house of commons during the time of privilege; but they may be prosecuted by distress infinite; and the real and personal estate of the party may be sequestered. And when a member's privilege prevents his being sued, the adverse party shall not be barred by the statute of limitations. But that privilege of

[k] Lex Parl. p. 395.

parliament shall not take place, at any time, to prevent the king's debtors from being sued; but only to protect them from personal arrests. No member of the house of commons, acting as a public officer, hath any privilege touching the execution of his office [1].

Thus the privilege of parliament is settled, in a manner as little inconvenient as it can well be to the public, and sufficient for the security and ease of each member of the commons, in order to his attending the service of the house. And all violations of this privilege of the commons being now punishable, not as formerly, by application from the house of commons to the king and the lords, but by their own sole authority, the safety, freedom, and dignity, of that house is effectually secured. And, moreover, the commons have not only a right to determine upon and secure the privileges of their own members, but the rights of their several elections, and of the freeholders and burghesses concerned in electing them; which right is certainly necessary, in order to preserve the freedom and independence of that house. So that they can now, without controul or interruption, resort freely to the house, and when they are there, they can use all the freedom of speech in enquiry, consultation, and debate upon any matter, that is necessary, in order to form laws, for the welfare of the public.

AND though the king and the house of lords have, each of them, a full negative, upon any bills passed in the house of commons, towards being laws, so as that they may reject them even without debate, or giving any reasons for so doing; and when they are thus rejected, the commons cannot offer them again the same session of parliament; yet they may offer them again in any, or in every, future session: and when a thing reasonable in itself, or for the real advantage of the nation, is proposed, and supported properly, by the house of commons, it cannot well be finally quashed. Accordingly it has been, with a great deal of truth, observed, by Lord Coke [m], that good bills or motions, in parliament, have seldom died quite; but, though quashed at one time, have taken

[1] Lex. Parl. p. 414. and stat. 1 and 2 Ann. chap. 18.

[m] 4th Inst. p. 32.

effect at another: the crown has, at length, been induced to consent.

If the bills, offered by the commons, do pass the lords and the king, and so become laws, they are no longer liable to suffer any alteration, so as to become, in any respect, different from what they were when the commons passed them. This is an advantage of no small moment, which we derive from the present established form of drawing up and passing bills. Antiently, in making laws, the commons did *Petere*, the lords *Assentire*, and the king *Concludere* [n]. Upon receiving the petitions of the commons, in parliament, the king advised with the house of lords at large, as well as with his own council in parliament. If both these thought fit that they should be granted; they were ordered to be drawn up in due form, by the judges and others of the king's council, and so were read and agreed to, the last day of parliament, and then were repositied among the rolls, and copies of them sent down to the sheriffs of the several counties to be proclaimed as laws.

BUT this method was attended with great inconveniencies, and disadvantage, to the commons; because, after their petitions had in appearance been granted, they seldom found, that, if they had not in reality been disliked by the king or the lords, but opportunity was taken by the council, who were employed in putting them into form, to sink some things, or alter others, that were not to their liking [o]. Thus, 18 Edward III, the commons exhibited a petition against provisions from Rome, which was agreed and assented to, by the king, earls, barons, justices and other sages of the law, that the matters contained in the said petition should be put in a convenable form, according to the prayer of the commons [p]; and yet no statute at all was made thereupon. Upon this and the like practices, 22 Edward III, the commons insisted that their petitions, in parliament, might be answered according to reason, and the answers to remain in force, without being changed or altered [q]. But notwithstanding this, in 25 Ed-

[n] Selden, *Jud. Parl.* p. 1639.

[o] See *Petyt. Inst. Parl.* p. 1. and

Cott. Abr. p. 159. art. 56.

[p] *Rot. Parl.* 18 Edward III. N^o. 32. 39.

[q] See *Cott. Abr.* p. 71. and *Brady's Edward III.* p. 245.

ward III. N^o. 59. cap. 3, there were added, in that statute, two special clauses, for the clergy, which were not in the king's answer [r].

In 5 Richard II. cap. 1, both the printed statute, and the roll of parliament, N^o. 17, say, that the commons consented to a law then made against heretics: but the next session the commons denied that they ever gave such consent [s]. "Que il ne fust unques assentu ne grante par les communes, mes ce que fust parlé de ce, fust sans assent de lour." And therefore they pray, "que celui estatut soit annienti [t]. To which the king's answer is, "y plect au roy." So that this act was assented to by the king and lords, but not by the commons. The means how it came to be reputed an act of parliament, says Lord Coke [u], was this: Braibroke bishop of London, being then lord chancellor of England, caused the said ordinance of the king and lords to be inserted into the parliamentary writ of proclamation, under the great seal, and to be proclaimed, by the sheriffs, among the acts of parliament. Lord Coke had seen the writ, an extract of which he there gives [w]. "But in the parliamentary proclamation of the act passed, 6 Richard II, the said act of 6 Richard II, whereby the said supposed act of 5 Richard II, was thought to be void, is omitted: and afterwards the said supposed act of 5 Richard II, was continually printed, and the said act of 6 Richard II, hath, by the prelates, been, from time to time, kept from the print."

BUT Doctor Gibson, bishop of London, (Codex, p. 400.) observes, with regard to this, 1st, That the words "it is ordained and assented in parliament" were not a peculiar sort of language used, on purpose, as Lord Coke thinks, because the commons had not assented; but were a form commonly used in those times, when acts had been agreed to, by king, lords, and commons.

2^{dly}, THE same learned bishop proceeds to say; it appears not, by the record, that the statute, 5 Richard II, was so passed by the king and lords, as that the commons knew nothing of it: but their complaint is, that they never assented thereunto; which, if

[r] Philips, on the Govern. of Eng. p. 538, 539. [s] Sir Edward Coke's 3^d Inst. p. 41. [t] Rot. Parl. 6 Richard II. N^o. 52. [u] Inst. 4. p. 51. [w] Inst. 3. p. 41.

meant of a formal assent, might at that time be a disputable point, whether they assented or not, considering that, in those days, the commons were not such a distinct and separate body, as they have been since: and it is not pretended that the statute was inserted notwithstanding the dissent of the commons.

3^{dly}, As to the crime of not inserting the statute of Richard II, before that was charged, it ought to have appeared that this had the assent of the lords more than the other had of the commons. Nothing is alleged for the repeal, but a representation from the commons, and the assent of the king; so that we may justly presume that the reason why the lord chancellor did not insert it in the parliamentary roll was, because the lords assented not to the repeal, as knowing that 5 Richard II was duly and regularly passed.

4^{thly}, CONSIDERING the public manner in which acts of parliament were proclaimed, in every county, is it credible, either that this omission, of 6 Richard II, had it been found, could have escaped the commons? or, if such a fraud had been discovered, that it would not have been complained of, in the parliament, which met the very next year?

5^{thly}, THAT very statute, 5 RICHARD II, which the commons are said not to have assented to, is expressly termed a statute, and mentioned as such without the least mark of suspicion, by three subsequent statutes, viz. 25 Henry VIII. cap. 14. sect. 1. 1 Edward VI. cap. 12. sect. 3. and 1 and 2 Philip and Mary, cap. 6. Thus far Bishop Gibson. But Bishop Burnet [x] is of the same mind with Lord Coke, and speaks of Bishop Braibroke as being guilty of pie fraudes, to support the corruption of the then church.

HOWEVER this matter was, the commons found reason to beseech the king [y], that the business done, and to be done, in this parliament, be enacted and engrossed before the departure of the justices; and while they have it in their memory; which implied that they apprehended some omissions or alterations. To which it was answered, that the clerk of parliament should do his

[x] Hist. Reformation, vol. i. p. 21.

[y] Rot. Parl. 2 Henry IV. No. 21.

endeavour to enact and engross the substance of the proceedings in parliament, by advice of the justices, and after shew it to the king and lords, in parliament, to have their advice: but, by the bye, there is no mention of shewing it to the commons. However the commons, probably still finding cause for complaint, in 7 and 8 Henry IV. N°. 65, through their speaker, prayed the king and the lords in parliament, that certain of the lords spiritual and temporal, whom it pleased them to appoint, and a certain number of the commons, whose names the speaker had written in a schedule, or any 10, 9, 8, 7, or 6, of them, might be at the enacting and engrossing of the rolls of parliament; and that their prayer and petition might be of record in the roll of parliament. Which request the king graciously assented to. But even after that, 2 Henry V. N°. 110, the commons still found reason to put the king in mind, that the statute ought not to be drawn up contrary to the meaning of the petitions that were then granted. And soon afterwards, they themselves formed their bills into the form of a statute, which order continueth to this day.

Mr. Glanville, a member of the house of commons, at a conference with the lords, 4 Car. I. 1628, gives much such an account as is here before given, and adds, “that ever since 2 Henry V, the right hath been, that the king taketh the whole, or leaveth the whole, of the bills or petitions.” At present, therefore, no changes but what the commons, and in like manner the lords, have approved, can be made in the bills that are to be passed into laws.

BUT farther, when any bills have been passed into laws, the king hath then no authority to dispense with them, *i. e.* to suspend their force, or hinder their execution. This authority our kings formerly exercised, and even claimed it as a legal part of their prerogative. In several cases wherein laws were made for the benefit of the public, to restrain the subjects from doing things to its disadvantage; or to oblige them to do things for its profit; yet our kings took the liberty to dispense with particular persons from conforming to statutes of both these kinds. For instance, there was a law to prohibit all persons from transporting wool to
any

any place beyond the seas, but only to Calais; but the king, Edward III, notwithstanding this act, granted licenses to several persons to carry wool to other ports. And, by another act, Gascoigne wines, and other foreign goods, were prohibited to be imported into this kingdom, but in English ships: which was a profitable law for the increase of the navy, &c. But the king gave license to such particular persons as he thought fit, to practise the contrary [z]. Nor were these proceedings much to be wondered at in princes, who naturally desire to enlarge their authority. Henry III was the first, that we find, practised it in England, in imitation of the popes, who had taken upon them sometime before to dispense with the canons of the church, by a clause of non obstante [a]. But it is much to be wondered at, that judges learned in the laws, and sworn to observe them, should ever, as they did, come solemnly to declare and adjudge, that such an authority to dispense with acts of parliament, clearly positive, belonged, by prerogative, to the kings of this realm; and was ever inseparable from them. In 2 Richard II, all the judges resolved that the king might dispense with the law concerning Gascoigne wines imported [b].

AFTER which, we are not to be surprized at what happened, in the reign of the same prince, in regard to several statutes against luxury in apparel. There was a parliament called, in London, about 5 Richard II, in which some statutes were made against luxury in apparel, &c. "*Sed quid juvant statuta parliamentorum,*" says Walsingham (p. 281.) "*cum penitus ex post nullum sortiantur effectum. Rex namque cum privato concilio cuncta mutare vel delere solebat quæ, in parliamentis ante habitis, tota regni non solum communitas sed et ipsa nobilitas statuebat.*" By several antient statutes, as 14 Edward III. cap. 7. 28 Edward III. cap. 7. 42 Edward III. cap. 9, and 1 Richard II. cap. 11. it was made unlawful for a sheriff of a county to hold office for more than

[z] See other instances in Sir Robert Atkynson's *Dispensing Power*, p. 13.

[a] See Bishop Stillingf. *Eccles. Cases*, vol. i. chap. 3. p. 126.

[b] Atkyns, p. 13.

one year, because of the great inconveniencies and mischiefs that followed upon it. And these statutes not proving effectual to hinder this practice, the statute 26 Henry VI. chap. 8, not only orders these statutes to be observed, but lays a penalty of 200 l. upon any person, who should hold that office longer than a year; and expressly declares, that all patents granted by the king, with the clause of non obstante to those statutes, should be null and void.

AND yet, notwithstanding this statute, all the judges of England did, in the Exchequer-chamber, in 2 Henry VII. resolve, and adjudge, that the king might grant a patent, with a clause of non obstante, for the holding a sheriff's office for more than a year; and that such a patent would be good in law. And these judges, and succeeding lawyers, asserted this prerogative to the crown, upon a pretended maxim in law, which might extend itself to multitudes of other cases. They said, indeed, that the king could not dispense with statutes which concerned *malum in se*; but he might do so in any which concerned only *malum prohibitum*; i. e. those which forbade things, which if they had not been prohibited by statute would have been lawful, or indifferent in their own nature. Now as most of the things about which civil laws are made, are of this indifferent nature, it is visible what a prodigious extent this doctrine gave to the royal prerogative [c].

UPON this and some other as weak foundations, the prerogative of dispensing with penal laws was determined to be in the crown, by all the judges, in the Exchequer-chamber, in the time of James I [d]. And these notions of the lawyers, and determinations of the judges, prevailed so far in the nation, that though they were plainly contrary to the antient acknowledged frame of our constitution, which always vested the legislative power, not in the king alone, but in him jointly with the lords and commons, and also contrary to several acts of parliament, which were made to grant the authority of dispensing to some of our kings, upon particular occasions, and only for a time certain, which acts plainly

[c] Stillingsf. Eccles. Cases, vol. ii. p. 151.

[d] See Coke's Reports.

implied

implied that the crown had not this authority in itself; else why was it given to it by parliament [e]? yet, by degrees, they influenced even the members of the legislature itself.

FOR in the parliament, 3 Charles I, 23d May 1628, Mr. Glanville delivered to the lords the general sense of the house of commons in these words: "When statutes are made to prohibit, not
" mala in se, but only mala quia prohibita, under certain penal-
" ties to accrue to the king, and to the informers that shall sue
" for the breach of them; the commons must, and ever will, ac-
" knowledge a regal and sovereign prerogative in the king, touch-
" ing such statutes, that it is in his majesty's absolute and un-
" doubted power to grant dispensations, to particular persons, with
" the clause of non obstante, to do as they might have done be-
" fore those statutes [f]."

WE see here that such a power was generally acknowledged to be vested in the crown, over some acts of parliament, as might, by parity of reason, be extended to many others: indeed, such a power as the acts of the whole legislature could not bind. Which was, in effect, laying open the greatest part of our constitution to the mercy of the crown. Of which acknowledged legal power, it is easy to conceive what advantage might have been taken in length of time, by artful management on the part of the crown. But, happily for our constitution, King James II, by applying this prerogative to indemnify persons who offended against the test act of 25 Car. II, was the occasion of its being blown up, and quite set aside; though James did not want the opinions and other endeavours of the lawyers, and even of the chief justices, to give a sanction to his illegal practices.

THE very important consequences that were visibly likely to follow, upon allowing the prerogative in that case, induced people to consider with attention upon what grounds it stood, and made them see through the clouds which the lawyers had formerly wrapt it up in: so that though the great Jefferies, Sir Thomas Herbert, chief justice of the common pleas, and many other sages

[e] See *Observ. on Eccles. Jurisd.* p. 53. 56.

[f] *Rushw. Coll.* part i. p. 571.
of

of the law, declared that King James II, had a prerogative of dispensing with the test, as a penal law, by a parity of reason to what had several times been adjudged to be legal in other cases, yet the generality of the people were by no means satisfied with their resolution; they were generally persuaded that no act of the whole legislature can be suspended or set aside by the king alone, who is but one member of it. And accordingly in the first and second articles of the declaration of rights, in 1 William and Mary, it was affirmed, that the pretended power of suspending laws, or the execution of laws, by regal authority, without consent of parliament, is illegal, and particularly as those powers have been exercised of late. And, in the same year, session 2. cap. 2, it is enacted, that no dispensation, by non obstante, of or to any statute, or part thereof, shall be allowed; but the same shall be held void, and of none effect, except a dispensation is allowed in such statute. So that, since that time, it is fully settled, as an unquestionable truth, that the king cannot dispense with an act of parliament; and consequently the surety of the people's enjoying the effects of good laws, once made, is sufficiently established.

THE house of commons can also take care that the laws be duly executed, by complaining of any persons in office, either ecclesiastical, civil, or military, who do not do their duty, or are guilty of corruption, or use their power in any way to the oppression of the subjects. No person but the king himself is exempt from their censure. They can animadvert upon the conduct of any other person, either lord or commoner, even the greatest minister; and can command any public records or papers to be made use of in evidence against him. They can oblige any commoner whatever to appear at their bar, and can imprison him, for the time of their own session, if they think proper, in order to oblige him to give evidence against others; and, though they cannot examine upon oath, yet, by such imprisonment, they can punish apparent prevarication. And though this last branch of their power does not extend to any member of the house of peers, who are not obliged to appear at their bar, or give evidence there, nor their house liable to be searched, or their private papers seized,

by

by their officers, yet they can impeach any person, whether lord or commoner, at the bar of the house of lords: and in case of impeachment for treason, or any other crime that deserves it, they can demand that the party be committed to safe custody, by the house of lords.

THEY have at all times a right of access to the king, to acquaint him with any matters they think proper for him to know. The king's pardon cannot be pleaded in bar to an impeachment of the house of commons, in any case. This was a point long ago thought necessary to the public welfare, in order to make ministers act with caution; for in 50 Edward III, the commons petitioned the king, "that no man, great or small, who had acted against his allegiance and oath to the king, and was impeached in that parliament, or in any other parliament to come, should be pardoned: and that a law should be made for that purpose." But notwithstanding, the power of pardoning, in bar to an impeachment of the commons, remained long in the crown. It was exercised remarkably, by Charles II, in the case of Lord Danby, in order to prevent some illegal and bad transactions, that had passed in that reign with foreign courts, from being brought to light. But now, by 12 and 13 William III. chap. 2. sect. 3. the king's pardon shall not be pleaded to an impeachment of the house of commons.

THE peers cannot give judgment upon a person impeached by the commons unless they demand it: and if they do, judgment cannot be refused. So that they are sure of either obtaining a censure upon persons criminal, or, at least, of opening and exposing their crimes, in a judicial way, to the notice of the world. And, indeed, the weight of the commons will always be, as it has been, so great, as well as the justice of the house of lords so constant, that it can hardly ever happen that a criminal justly impeached by them, how great soever he be, can escape a just condemnation. So that in all deliberations and actions of ministers of state, the principal point should be (as Charles II once said it was with him) to consider what a parliament will think of them.

S E C T. IV.

Of the Number of small Burghs which send Members to Parliament, and the Means used to obviate that and other Inconveniencies.

FROM what has been said, it is evident, that the house of commons is possessed of all, or at least of the most important, powers and privileges necessary in a representative of the people at large: and, if there be yet some disadvantages and defects remaining in our constitution, perhaps they are not so great as they may, at first sight, be thought. Monsieur Rapin de Thoyras [g] looked upon it to be a considerable defect in our constitution, that the matters to be treated of, in parliament, are not expressed in the summons, as King John promised they should, and that the members of our house of commons have not instructions about them, from the people whom they represent; or, if any such instructions be given to them, that they are at liberty not to observe them. The matter of fact indeed is true: our members of parliament are not, by law, obliged either to consult those who have chosen them, nor to have any regard to their instructions, farther than they themselves judge them to be reasonable; for, though a man is chosen by a particular county or burgh, he is, in law, reputed to serve for the whole kingdom [h]. But as these things could not be ordered otherwise, as the state of our nation is at present, so some persons are far from thinking, with Mr. Rapin, that these are circumstances of any disadvantage in our constitution.

FOR *1st*, it would be impracticable for the king to express, in his summons, all the things that are to be treated in parliament; because any member of either house of parliament is at liberty to propose, and ask leave of the house to bring in, any bill that he thinks proper, which he may keep secret to himself till the time of parliament, though it really may be of great importance. In Queen Elizabeth's time, a bill was proposed to limit the succession

[g] Dissert. sur les Whigs et Tories, p. 246. vol. x.

[h] Coke's 4th Inst. p. 14.

of the crown; and, in Charles the Second's time, a bill was proposed for taking from the crown the power of creating any more new peerages than a certain number. These, and many other bills of the utmost importance, have been, and may be, first proposed by private persons: moreover they may have a design to call to an account, or to impeach, ministers of state, &c.

2dly, It would be often impolitic in the king to make public, before hand, what laws, or other matters, he designed to propose. I mean so as to specify what supplies of money would be needful for the service of the next year, or what wars, or alliances, he designed to make, or several other matters of that nature; because, by so doing, he would give foreigners, his enemies, an opportunity to know, or guess at, his councils, soon enough to provide against and defeat them.

At the same time, even supposing that the matters to be treated on were specified, the people would not be able to give sufficient or proper instructions to their representatives, as to matters of this nature; because, not knowing the circumstances of things abroad and at home, being neither acquainted with the designs nor the dispositions, nor the powers of foreign courts, they cannot judge truly of what measures are to be taken with regard to them. Nor would they be able to judge competently of several laws that might be proposed to be made, even with regard to our constitution at home. Things of this sort depend frequently upon the knowing and balancing abundance of particulars, which can only be known to those who have the inspection, for instance, of the custom-house accounts, the state of the imports and exports, the produce of the several parts of the nation, the state of their manufactures, their different conditions, and the alterations likely to be in each as to popularity and wealth, the dispositions of the people as to religion and as to loyalty, their circumstances as to quartering and subsisting of troops, and a great variety of other things, which must be exactly known and weighed, before any man could judge aright, whether a law for levying money, in this or that way; whether a law for allowing, encouraging, or forbidding this or that branch of traffic; whether a law for admitting any of the subjects

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to this or that privilege, religious or civil; whether a law for retrenching this or that branch of the prerogative of the crown, or adding to it in any other instance; whether, I say, any laws of these, or the like kinds, would be really expedient, and for the public welfare or not.

If the king was to declare, in his summons to parliament, that he intended to propose any things of this nature in parliament, it would be hardly possible for persons in the country, or even in London, to judge rightly of the matter immediately: the greatest natural sagacity or prudence, without having a due knowledge of circumstances, or proper materials on which to form a judgment, would be unable to do it aright. And not being capable of judging well for themselves, it is not possible that they should duly instruct their representatives. If these should be obliged to conform to instructions given upon such imperfect views of things, the public must necessarily suffer by it.

WHEREAS, on the other hand, by the representatives being at liberty to follow their own judgment, in parliament, they have this great advantage, that by the right of the house of commons to demand any public papers, from the offices of customs, excise, accounts, &c. relating to the state of the nation, and to apply to the king for others, and from the great light to be had by the mutual informations which such numbers of gentlemen, coming together from all parts of the nation, may give to each other; from the various views of things that may arise from their debates and reasonings, and examinations of evidence in the house, a member of good sense, integrity, and attention, may have very great advantages for forming his judgment, probably much otherwise than his constituents would have done in the country, from their own knowledge of things only; and therefore it must be much for the advantage of the public, that he should be at liberty so to do. It would be a great inconvenience if he should be confined to act according to their judgments, who have had but narrow and partial, or probably, in many cases, false, views and accounts of things.

If members were under this obligation, there would be two ill consequences, in particular, very likely to happen, *1st*, There might

might be, in several cases, combinations between some parts of the nation, for the advantage of their counties or parts of the kingdom, in preference to others. "The members who serve for one part of the kingdom are frequently found in opposition to the representatives of another, for the sake only of particular interest in their own counties [i]." The members of the west might sometimes be against those of the northern parts; or they both might be, as probably they would in case an alteration in the method of assessing the land-tax was proposed, in opposition to the members of the midland counties. This disposition has sometimes appeared, and probably would be much more, if the persons who serve for the burghs in those counties were tied down to follow the prejudices and partialities of their constituents. Whereas, being at liberty to vote as they judge best, they may be more easily drawn to take that course which is most for the general interest of the whole.

2dly, An obligation upon the members to follow the instructions of their constituents, would give too much power into the hands of the lower classes of people of this nation, who might not use it well: or, at least, it would encourage and foment such a democratical spirit in them, as would, by degrees, weaken and destroy the essential balance of power in our constitution.

It was found, by experience, to be a great defect in most of the republics, and popular states of antiquity, that they allowed the people at large to have deliberative voices in matters of this nature. They were frequently influenced by their demagogues, and their own want of judgment, to very rash and imprudent measures. Pericles indeed, flatteringly, told the Athenians, that each private person understood public affairs very well; but experience shewed the contrary; and the most judicious politicians, even of their own countrymen, complained of it. Polybius [k] blames the Athenian and Theban governments; for that in them *ὁχλῶς καὶ ῥητορικῶς* τὰ ὅλα. The same author observes [l], that, at the time of the second Punic war, the constitution of the republic of Carthage was impaired and corrupted: for with them "plurimam populus

[i] Fletcher of Salton's Works, p. 408. [k] Lib. vi. p. 488. [l] Ibid. p. 494.

“ sibi auctoritatem vindicaverat, quæ apud Romanos, illibata
 “ penes senatum, adhuc erat. Quo factum ut illic, populo de
 “ rebus omnibus consultante, hic, civium optimo quoque, Romani
 “ vicerint.”

TULLY observes, that “ Græcorum totæ respUBLICÆ sedentis
 “ concionis temeritate administrantur. Itaque ut hanc Græciam,
 “ quæ jam diu suis consiliis afflicta, est omittam; illa vetus, quæ
 “ quondam opibus, imperio, gloriâ floruit, hoc uno malo concidit,
 “ libertate immoderatâ ac licentiâ concionum [1].”

It was therefore a right provision in all the constitutions of the Gothic model, that these inconveniences were avoided, by leaving only the choice of representatives to the people, out of themselves; but, at the same time, investing them, when once chosen, with a discretionary power, to act as they thought fit, within the established bounds of the constitution; that is, so as not to give up any point, or make any alteration, that would have an effect or tendency destructive to its welfare. This is at once a temperament against the too great vehemence of the people, and a guard against their unskilfulness and want of judgment; at the same time, that it serves to keep up a spirit of liberty in them, and, in a great measure, secures them against the ill management of their representatives: since, if they do not approve their conduct, in parliament, they may, after a short time, lay them aside, and send other persons more likely to serve them well.

As to this nation, in particular, we see, by the times of Richard II and Edward VI, when the populace got a-head, what work they would probably have made, had they then been to instruct their representatives, and had these been obliged to follow them. In the reign of Charles I, we see what instructions the lower classes of people actually gave to their representatives, as far as they could do it by petitioning the house of commons. It might justly be expected that some things of the like sort would be done, on other occasions, if the right of the people, in the counties and burghs, to instruct their representatives, and to oblige them, was once fully established.

[1] Orat. pro Flacco, sect. 7.

IT is an objection much more plausible, which Monsieur Rapin makes to that number of small burghs, in England, which send members to parliament, and are, each of them, represented by two persons, as well as any of the counties, or the largest cities, except London. He says this disproportion in the representatives, to the number and wealth of the persons represented, is wrong in itself: and lays the choice of members of parliament much more open to the influence of the crown, than it would be if these small burghs were disfranchized, and the several greater towns were justly represented, according to their number and their wealth. How far this objection is really of weight, I shall presently consider, after I have first observed how things came into this state.

Now this inequality hath arisen partly from the change of condition of some towns; which, having formerly been considerable for their numbers of people and their wealth, are, by length of time, fallen much to decay: such are Gatton in Surry, Old Sarum in Wiltshire, and others. But it has indeed been owing much more to the practices of the crown, since the beginning of the sixteenth century after Christ. From Edward the First's reign, to the end of that of Edward IV, there were only one hundred and seventy members sent to parliament from all the cities and burghs in England. Mr. Brown Willis [m] says, that, in the year 1546, there were only one hundred and twenty-six burghs that returned members to parliament: of which there were few but what were considerable for people and wealth. But in Edward the Sixth's reign, and so downwards, for the two following reigns, the importance of the house of commons being more and more found, the crown, or its ministers, caused several more burghs to be summoned, of which some had never sent any members before, nor were they considerable for the numbers of their people, or for their wealth; but they were such as the crown could hope to influence, and therefore they were summoned, when several larger and more considerable towns were omitted. The weight and in-

[m] Notit. Parliam. vol. i. p. 8. pref.

terest which the court had, at that time, in the house of commons, got these new members to be received and admitted there; though there seems to have been, at first, some question made, whether they ought to be admitted, or not?

IN 23 Elizabeth, the attorney and solicitor general consented to a committee of the house of commons, appointed to confer with them, that those burghes who were returned for divers burghs, which did not return any burghes last parliament, should remain in the house, according to their returns, that the validity of their charters might be examined [n]. In Edward the Sixth's reign, twenty-three new burghs were summoned to send burghes to parliament. Philip and Mary added thirteen more. Elizabeth added thirty. James added the two universities, and twelve burghs. Charles I added eight burghs. And Charles II added the county of Durham and two burghs.

ACCORDING to our antient constitution, the king might incorporate any town, and enable them to send burghes to parliament; but this part of the prerogative, of increasing the number of burghes of parliament, has been given up by our late kings: for if the king, at present, was to make a new parliamentary burgh, it would rest in the power of the house of commons whether they would receive the members. And the issuing of quo warrantos out of the court of King's Bench, the court of Exchequer, or any other court, against burghs, that antiently or recently sent burghes to parliament, to shew cause why they sent burghes to parliament, and all the proceedings thereupon, are, coram non judice, illegal and void: and the right of sending burghes to parliament is questionable in parliament only; and the occasioners, procurers, and judges, in such quo warrantos and proceedings are punishable, as in parliament shall be thought consonant to law and justice [o].

THE burghs added, during the reign of king James I, were not all added by the king's desire. Several of them, particularly Agmondesham, Wendover, and Great Marlow, were added, against

[n] See Prynne's Parl. Regist. part iv. p. 1179.

[o] Nalson, p. 588.

the king's inclinations, by the house of commons, in the parliament, 21 James I, upon a petition made from those burghs to the house, that they had antiently sent members to parliament, and desired to be restored to that privilege. The king, who declared himself unwilling to have the number of burgessees increased, saying he was troubled with too great a number already, commanded his solicitor general, Sir Robert Heath, then in the house of commons, to oppose it what he might; but it being alledged on the behalf of the burghs, that the interruption in their sending burgessees, for four hundred years past, was not owing to their own neglect, but to the fault of the sheriffs; or if it was owing, in any measure, to the burghs themselves, it was because their predecessors were poor, and unable to maintain their members; whereas now they were content to undergo that charge. That if some burghs might be thus suffered to be discharged from their parliamentary service; by a parity of reason others might be so likewise; and consequently there might come to be no parliament for want of burgessees. Lastly, that these were parliament burghs by prescription, and not by charter: for every one of them had their several forens [p]; and paid fifteenths as all parliamentary burghs, and not as other burghs or towns. Upon which reasons, the house of commons voted them to be revived, and made returning burghs: and the king, having taken the two chief justices opinions that it was just, did, at length, consent to it.

THE house of commons, in being forward to regrant this right to these and other burghs, seemed to have thought that their doing it would be strengthening the liberty of the nation; and, by making the house of commons more numerous, render it less dependant on the crown. But in this they certainly did not judge right: it has been found, on the contrary, that many of the smallest burghs have been the most liable to be influenced, and often have fallen into the most scandalous corruption. This appeared to such a degree in some of them, that in the case of Stockbridge in Hampshire, the house of commons, finding that burgh noto-

[p] Forens is the outlying part of the parish, belonging to the burgh. Brown Willis, vol. i. p. 149.

riously guilty of bribery, in their electing members of parliament, had a design to disfranchise it: and, A. D. 1701, also to have made an act for enlarging some others of the lesser burghs, by admitting a competent number of neighbouring freeholders to vote in them. But the bills, that were brought into the house of commons for that purpose, were dropt [9]. Innovations and changes of that sort probably were thought dangerous, and not to be ventured upon, without great necessity, in such a constitution as this. And there does not seem to be as yet any necessity of this sort: for though undoubtedly the condition of the small burghs is not such as one could wish it to be; yet there are several circumstances, in the case of our nation at present, that render it less inconvenient than it may at first sight appear.

ONE of these circumstances is the liberty which all our burghs, small as well as great, have at present, by custom, of chusing *non resiants* to represent them in parliament. By an act of parliament, 1 Henry V. cap. 1. it is enacted, that each person serving for a burgh or city, should be resiant, abiding, and free of the said city or burgh, and none other in any wise. This is explained in 23 Henry VI. cap. 15, that the burgesses chosen to come to parliament, shall themselves be resiant, dwelling and abiding. And by the lists of members that remain, it seems that, for a considerable time, the members for cities and burghs were really resiant, and members of the communities, and were a low kind of men, being several of them traders.

If these statutes had continued to be strictly observed, they might have been of ill consequence, as they would have confined the choice of persons, for representatives of many burghs, to those who were not equal to that great trust, by reason of the lowness of their condition, want of knowledge in affairs, &c. but at present, though those statutes are unrepealed, yet they are so little regarded, that persons from any part of England are capable of being chosen for any cities or burghs. By which means the small-

[9] The bill for disfranchizing Stockbridge, as to sending members to parliament, was brought into the house of commons, January 8 1693, and continued there till April 19 1699, when it was thrown out.

est burghs are often represented by men of the greatest estate and ability in the whole house of commons, even by the eldest sons of peers. This last circumstance has been fully allowed and settled only since Edward the Sixth's time; and it has been thought a disadvantage to have so many of the noble families in the house of commons, but it certainly is much otherwise; for, as I have observed above, it is of great moment to the welfare of the whole constitution, that the house of peers should preserve a due weight in it, as well as the house of commons. Now this proper weight is very much lessened by the decrease of many of the peers estates, and the dependances that they had antiently belonging to them: therefore, in order to make up this, in some measure, it is very expedient that the relations and eldest sons of peers should have seats in the house of commons; which circumstance tends to enlarge the weight of the upper house, promotes a good understanding between the two houses, and prevents the commons from encroaching upon the peers.

AND that no city or burgh can be represented by any persons of very low circumstances, is provided by the statute 9 Ann. cap. 5, which enacts that no person shall serve in parliament, for any city or burgh, but who hath 300 *l.* per annum in freehold or copyhold lands, over and above what will satisfy all incumbrances; unless he be the eldest son of a peer, or of a person who himself hath at least 600 *l.* per annum in freehold or copyhold land beyond reprises; which last reserve is the qualification necessary in order to serve for knight of a shire. And it is at the same time enacted, that each candidate may be obliged to take an oath, affirming that he hath such an estate, and to shew where it lies. By these means all members of parliament must be men of some competent fortune: and, indeed, few are of so little as 300 *l.* per annum, for most persons of that estate have also more lands or money besides.

THE second provision that makes the inconveniencies of small burghs in our constitution more supportable, is the care that is taken by several statutes, to prevent undue practices, and especially corruption, in the choice of members of parliament. Monsieur Rapin de Thoyras observes, that the smallness of the burghs lays
them

them more open to the influence of the crown. This is not universally true; for many, even the greatest number of the small burghs, are so much under the influence of gentlemen of great estates and quality, that they are less liable to be influenced by the crown than several of the larger burghs. Indeed some of them are entirely in the power of those gentlemen; because the votes depend upon inhabiting houses in the burgh, which houses are the estate of those gentlemen. Indeed this is not quite so agreeable to the original design of our constitution; but it is of no ill effect: for it is only putting those gentlemen upon a more advantageous foot than others, by securing to them seats in the lower house. And as they are mostly gentlemen of very large estates, they are as little liable to be influenced by the crown, and as much able to serve their country, as the members chosen by counties or large burghs. Others indeed of the smaller burghs do lye more open to the influence of the crown, on account of the poverty of their voters. But influence of this sort, upon their elections, is much more restrained than it formerly was, both by the alterations that time has made, and by various statutes provided for that purpose.

THE crown had formerly, the tenures, the fee-farms, and the forests; by which it could distress the electors in many places. The warden of the Cinque Ports claimed a right to nominate one member in each of those ports. The sheriffs could, with impunity, neglect some burghs, and return whom they pleased for others. The king and the lords, and in aftertimes the chancellor, had an authority to judge of contested elections, and to issue new writs upon them [r]. Now all these things are altered; the tenures, the fee-farms, and the forests, in a great measure, as to their influence, are gone. The warden of the Cinque Ports claim is taken away. The elections are to be free. No custom or excise officer, or the like, can interpose their authority. No money, place, pension, or promise of any such, can be given to corrupt the voters. The sheriff is under great penalties if he makes false

[r] See Prynne's pref. to Cott. Abr. p. 28.

returns. The king's, the lords and the chancellor's authority, as to judging of contested elections, or double returns, is taken away; so that, supposing the laws be duly observed, there cannot be much influence applied from any quarter.

BUT perhaps it may be asked, Is it supposable, in this age, that the laws will be observed? have they been so, in any degree, since the restoration? have not the courts, at all times, been able to gain parliaments? are they not likely to do the same for the future? and if they do, can our parliaments be said to be any thing more than a bare form, or name? I do confess that these things have been said, in strong terms, by some foreign writers, and lately more insisted upon than ever, by some of our own. There are those who think that if things continue to go on in this train, the freedom of our constitution will be wholly lost, or rendered in a great measure insignificant. How far these consequences are with reason to be apprehended, I shall consider hereafter. In the mean time, I must observe, that it is justly to be accounted a happy situation, that our constitution is established as well as it is, considering the many difficulties our ancestors had to contend with.

OUR kings formerly took the liberty, in their proclamations for parliaments, to direct what sort of men should be chosen in them. Henry IV. in his first year, A. D. 1404, summoned a parliament to meet at Coventry, and directed the sheriffs that no members should be returned who knew any thing of law [s]. And before the election of the parliament in 1603, in the beginning of the reign of James I, a proclamation came forth directing the electors what sort of men they should return members, and the sheriffs to what burghs they should omit sending precepts, under the peril of the king's heavy displeasure [t]. The crown formerly could, upon many occasions, declare the charters of burghs forfeited; and even so late as the reigns of Charles and James II, the crown got many charters surrendered, upon the most frivolous pretences; in order to give new ones, with powers that might enable them to pack parliaments. But now those quo warrantos, which they

[s] Royal Treasury, p. 139.

[t] Atterbury on Convoc. p. 423.

used for that purpose, are declared to be illegal; so that the crown has no such room to tamper with them.

THE only influence the crown has at present, must be, either by money, or by hopes of employments, or in general by views of interest in the electors. And there are various acts of parliament in force against employing these, to corrupt these electors. By 7 William III. cap. 7. no person shall, after the teste of the writ, give any money, gift, or promise, or obligation, to any one for his vote, on pain of being rendered incapable to sit in parliament. By an act 2 George II, every elector is to swear, that he hath not received by himself, or by any other person in trust for him, or for his use or benefit, directly or indirectly, any sum of money, office, place, employment, gift, or reward, or any security for such, to give his vote. If any person be required to take this oath, and shall vote without doing so, he shall forfeit 100/. And to prevent the court's undue influence upon members, after they are in the house, it is enacted, 4 Ann. cap. 8. that no person having any new office of trust or benefit under the crown, as commissioners for prizes, or for transports, agents for regiments, &c. shall be capable of being chosen a member of the house of commons. By 1 George I. cap. 56. no person, having a pension from the crown, for any term or number of years, either in his own name or in trust for him, is capable of being a member of the house of commons: and if any person, who shall have such a pension at the time of his election, or at any time after, shall sit and vote in the house, he shall forfeit 20/. for every time he sits and votes.

FROM these numerous and strict provisions, it is evident, that, if the laws in force be duly observed, there can hardly be a possibility that parliaments should be influenced to do any thing contrary to the welfare and real interest of the nation. And as the nobility and gentry of England are possessed of such a share of the legislature, with so many great and uncontestable privileges, they have it entirely in their own power, if they are not greatly wanting to themselves, to preserve their liberty against any attempts that may be made against it. While they are in parliament, they may,

if they will, be independent and serve their country, without being under any corrupt influence, or any terror. Now for a people to be in such circumstances at present; to have a parliament so fenced with laws and privileges, must, with reason, be accounted a great degree of happiness.

ACCORDINGLY it has been acknowledged so to be; by several French writers; who, at the same time, regret the loss of the meeting of their estates. Thus Bodin: “*quinetiam illi ipsi, quos Hispani curias, Angli parlamenta vocant, aboleri cupiunt, urgentibus periculis, ad conventus, velut ad sacram anchoram, confugiunt, ut seipsos remque publicam ab hostibus tueantur. Ubi enim melius de curandis reipublicæ morbis, de jubendis legibus, de statu conformando, quam apud principem, in senatu, coram populo agi potest? illic querelæ tenuiorum, illic potentiorum injuriæ, illic furta, peculatus, fordes, quæ sæpius, ignaro principe, fiunt, explicantur. Illic ordinis cujusque rationes exaudiuntur. Quamobrem sapienter ab Anglis et Hispanis institutum est, siquidem illud teneremus, populi conventus tertio quoque anno haberi. Et ut princeps libentius id faceret, nullum imperari tributum poterat nisi populi conventus habeatur. Nostri reges non ita sæpe ut Angli comitia cogunt. Sed cum sexdecim provinciae in hoc imperio numerantur, sex habent sua peculiaria quædam comitia: quæ ut omnino tollerentur modis omnibus tentatum est ab iis qui sua scelera et peculatus pervulgari metuunt. Ut etiam Carolo VIII imperium ineunte, cum universa provincia conventus haberi oportere unâ voce conclamaretur, non defuerunt qui majestatis crimen ingererent iis qui in senatu cum populo idem sentirent. Quibus acerrime restitit Philippus Cominius rerum gerendarum usu clarissimus senator. Sed quam sint necessaria totius populi concilia, ex eo perspicitur, quod quibus populis sua concilia cogere licet, cum iis optime agitur [a].”*

AND Mathurellus laments the loss of the authority of the parliament of Paris, which was but a shadow of the antient states.

[a] Bodin. lib. iii. p. 346.

“ Utinam augustissimi illius senatus auctoritastam illibata atque
 “ inconcussa foret, ut fuit antiquis temporibus: certe melius nobis-
 “ cum ageretur [b].”

BUT here perhaps it may be asked, how it happened that the French, and, in like manner, the Spaniards, and not only they, but the Danes and the Swedes, who antiently were as free as we, and who had all originally public constitutions, but little different from ours in England, came, at length, quite to lose them, and fall under arbitrary government; while we, on the other hand, have gone on improving our constitution; so that it is at this hour much better than it ever was in former times? Now, in the first place, this change ought, certainly, to be ascribed to the providence of God. But as the supreme being, at present, acts generally by second causes; there were, no doubt, some causes of this kind, that produced these similar events, in a number of different kingdoms; and what these causes were, I shall, in the following sheets, endeavour to make appear.

[b] Mathurellus Resp. ad Hortoman. Franco-Gall. p. 154.

T R A C T III.

Of the Means whereby the Free Constitutions of other Nations have been impaired, while that of England has been preserved, and improved.

S E C T I O N I.

The Divisions and Animosities between the Nobility and the Commonalty were the chief Cause, which made several European Nations lose their Liberty.

AFTER I have thus vindicated the lawfulness, and shewn the advantages, of our present constitution, beyond all others in Europe, many may, perhaps, have the curiosity to enquire, how our constitution came to be thus preserved, and improved, while others, which at first were much the same as ours, have been changed much for the worse, and have, in a great measure, lost their original liberty? now this, under God, I take to have been owing to the different circumstances that the commons of England were in from those of most other nations in Europe, and their better agreement with the nobility: for this difference of circumstances, both disposed and enabled them to do more for preserving our original constitution, than the common people of other nations either could, or were ever disposed to do.

BUT in order to comprehend clearly the force of this reason, I must make some farther enlargement upon it; and must observe, in the first place, that in the constitutions of the Gothic model, the power that was to serve as a barrier against the encroachments of the crown, was lodged chiefly in the nobility: which word I do not now use in that limited sense in which it is commonly understood in England; but mean by it, as it is used in other countries, to include all those who are possessed of land, held by military, or other free and honourable tenure, and have a right to bear arms, in token of their genteel extraction, in opposition to the trading, mechanic, and labouring part of the people.

It is evident, that, in the several kingdoms that were formed upon the ruins of the Roman empire, the noblesse, in this large sense, were possessed of all, or far the greatest part of the lands, except those that were in the crown and the church. And from thence, by the nature of their tenures, they had such bands of attachment to each other, as well as such means of attaching the peasants and mechanics to them, that it was not hard for them to make such combinations, as would give them a force superior to that of the crown itself. Each kingdom had a small number of great men, possessed of very large territories or seigneuries, held by them immediately of the crown, which they parcelled out into less divisions, and granted to their tenants, to be held of themselves, by like military and other services, as they were obliged to render to the crown. These tenures obliged them to appear in the field, with horse and arms, at the summons of their lords, and to continue there so long as custom or the law required; and as every such under-tenant could, by making good bargains of farms, &c. oblige and attach some lower people to him, and so of course to the chief tenant; accordingly it came to pass, that most of those great lords could raise, at their pleasure, numerous bodies of men, whom, by keeping large armories and great stables of horses, they could, upon a very small notice, equip for war.

AND when several of these great nobles joined together, they were capable of making a stand against the crown, when assisted only by its own peculiar tenants, *i. e.* by the forces it could raise from its own domains: it is true, the crown was intitled to the military service of all those great barons that held lands of it, when a foreign expedition was to be made; and in home rebellions, it was intitled to the service of all men in the nation: and it had generally some of them in its party in civil wars. But if its cause was notoriously bad, and tending to subvert the constitution, there were generally enough of these barons who would make a stand, and unite to preserve it.

THIS state of things continued in the European kingdoms, from their first establishment, upon the ruin of the Roman empire, for several

several centuries [c]: and it might have continued longer, if several events had not happened, to produce alterations in the way of living, and of making war. Not but that otherwise these constitutions must have gradually decayed, because length of time, forfeiture of the tenants, and the failure of families, could not but occasion the splitting into lesser parcels and subdivisions, those estates in land; which subdivisions must needs have lessened the power of the noblesse considered as a body: because combinations among them, in opposition to the crown, must become much more difficult as their numbers increased, and so dissensions would more easily and frequently spring up among them. Though, on the other hand, the power of the crown must also grow less, by degrees, from the alienation that would naturally be made of crown lands, rents, &c.

BUT the growth of trade in Europe, by the discovery of America, and by finding a new and easier way to the East-Indies by the cape of Good Hope, events which both happened nearly together, about A. D. 1494, and the great plenty of money arising in Europe from the wealth brought from thence, were the causes that contributed very much to hasten the decay of the feudal constitutions. For trade introducing wealth, introduced also luxury, and an expensive way of living among all, but especially the trading people yet more, in order to keep up the dignity of their rank among the noblesse.

AND the greater the quantity of money grew, the revenues of their estates sunk in proportion; because most of them had before agreed to take their rents in certain payments of money, which were now become less considerable [d]. So that they could no longer make the same figure, or preserve the same weight and influence, which they had formerly; but were like old trees, that were decaying, and afforded little fruit or shelter, while the under-wood about them was very thriving.

BUT probably it may be thought that this change in the circumstances of the noblesse and body of the people, might not have

[c] See Count Boul. Hist. vol. iii. p. 145.
iii. p. 145. of the decay of the value of feudal estates.

[d] See Count Boul. tom.

contributed

contributed much to the strengthening of the crown, if the noble and commonalty could have acted in concert with each other, and if the latter had been in a proper disposition to assert their liberties; because the force, in opposition to the crown, would have been the same, or greater than it was, though placed in somewhat different hands; and the strength of the crown would, at the same time, have decreased, by the sinking of its chief-rents and fee-farm-rents, and by the alienation of its demesne lands. Indeed this would have been so, could the nobility and commons have preserved a good correspondence with each other.

BUT I must observe, that the condition of the mass of the people was so low and servile, and they had been so ill used by the nobles, that, in process of time, they had contracted such resentments against the noblesse, that they were, from thence, both indisposed and unable to take due measures for preserving their liberty against the crown. The commonalty, indeed, in several of these kingdoms, consisted originally, for the most part, of the natives, whom the conquerors subdued; or at least they were part of the scum of those victorious armies, to whom the officers and others of distinction, who had the lands, and became the noblesse, committed the management of those lands, as to the laborious part; allowing them for their labour just enough to live upon, but keeping them very poor, and with drudgery and ill usage so depressing their spirits, that they could never aspire to any part in the concerns of the public, nor even to intermarry with the gentry, and so by alliance, or increase of fortune, raise themselves into their body.

SUCH was the case of the commons in France and Spain, Germany, Poland, and indeed in most other nations of Europe, in which the arms of the northern nations prevailed and made settlements. These nations, whose taste was chiefly for hunting and war, regarded husbandry, trade, and mechanic employments, as unworthy of them; and accordingly despised the merchants and artisans, as well as the peasants: upon all occasions using them with an oppressive insolence, that was as provoking as it was unjust.

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IN consequence of this usage, it could hardly be otherwise, than that the body of the people should contract, and always keep up, some resentments against the noblesse, and conceive themselves to have a different interest from them. And these resentments proved sufficient to hinder them from acting in concert with each other, and so gave able ministers, of the several crowns, opportunities of managing the noblesse, and the people, one against the other, till each crown got possessed of such a power as made it too hard for them both; whereby even the noblesse themselves were brought under the same servile yoke which they had laid, and kept on the commonalty.

S E C T. II.

Of France and Spain.

THIS was remarkably the case in France, in the reign of King John, about A. D. 1356, which was one of the most favourable junctures for putting the constitution of that kingdom upon a good foot of liberty. For two centuries before that time, the commons of that kingdom, especially those in cities and towns, had been getting, by slow degrees, out of that servitude, which they were originally under, to the crown and to the nobles. "Sous Louis le Gros, A. D. 1108, on commence d'affranchir les grosses villes; c'est à dire, accorder à leurs habitans en general chartres de liberté, et des coutumes accompagnées de la remise du droit d'imposer des tailles à volonté; de celui de la morte taille, par où l'on consentoit que les enfans succedassent à leurs peres en héritages et en meubles: et enfin de la remise du droit de suite, qui paroissoit le plus important, en ce qu'il mettoit les hommes en liberté de choisir un autre domicile [e]." This freedom consisted in their having a community, a power to chuse officers, to exercise trade, &c. [f].

[e] Boul. tom. iii. p. 39.

[f] See Alteserra upon the Jus Communiz.

THEY could not come into this condition without the consent of the crown and of their mesne lords. "Les habitans de Vezelay avoient pris la liberté de faire une commune, sans le consentement de l'abbé seigneur du lieu, et sans lettres du roi. Louis le Jeune, A. D. 1161, s'y transporta, et les soumit en peu de temps." But many, and at last most of the lords sold these liberties to their towns for large sums of money. "Louis Hutin, A. D. 1314, donna une ordonnance pour l'affranchissement de tous les serfs qui restoit encore en France; mais pas sans finance à son profit." This ordonnance, however, was not executed, either because of the shortness of that prince's life, or because of the opposition which the barons gave to it.

"ENFIN Hen. III, se croyant dans une conjuncture plus favorable, accorda de nouvelles lettres à tous les mains mortables du royaume, pour recevoir leurs affranchissements, au moyen d'une mediocre finance: mais le Marechall Daumont, et plusieurs autres seigneurs du Berry, s'étant pareillement opposez à l'effect de ces lettres, elles sont pareillement demeurées sans execution [g]." By degrees, however, by the time of Philip the Fair, so great a part of the middle and lower sort of people in France had gotten their liberty, and, in pursuance of it, had so much wealth or substance among them, that Philip, as the most expedient way of raising money without too much discontenting his people, thought proper to call a general assembly of the estates; and, with the clergy and nobility, who were, from the beginning, members of the estates or great councils, to admit also the deputies of the cities and rural districts, as members of that assembly; that they might give their consent to the money that was to be raised upon them. This was done in the general assembly of the three estates in A. D. 1313. And several of the successors of Philip the Fair continued the same course; and even, in a great degree, allowed that the estates had a right to be consulted, when money was to be raised.

"LES Normans, dans le tems de Philippe de Valois, A. D. 1328, obtinrent enfin la confirmation de la Chartre de Louis Hutin,

[g] Count Boul. tom. iii. p. 50.

" avec

“ avec une declaration expresse, qu’il ne seroit jamais permis de
 “ rien imposer à la province, sans le consentement des etates. Et
 “ Nicolas Gilles, et le Rosier de France, disent positivement,
 “ qu’en cette année 1338, il fut arreté et conclu devant les trois
 “ etats de France, present le roi, Philippe Valois, que l’on ne pour-
 “ roit imposer ni lever tailles, en France, sur le peuple, si urgente
 “ necessité, où evident utilité, ne le requeroit de octroy des gens
 “ des etats [b].” So that if things had been well managed, and
 with due concert, on the part of the nobility and people, this great
 point, for the securing the liberty of that nation, might at length,
 have been effectually gained from the crown; especially after the
 loss of the battle of Poitiers, in the time of King John, A. D.
 1356, and during the following captivity of that prince. At that
 time the Dauphin, who was lieutenant of the kingdom, found
 himself under a necessity of having a general convention of the
 three estates, in October 1356; and Count Boulainvillers says [i],
 “ Que le plus grand nombre des deputies qui se rendirent à l’assem-
 “ blie, y porterent un dessein formé de travailler par preference
 “ à la reformation du government, et à resserer l’autorité despotique,
 “ qui n’avoit servi qu’ à perdu le royaume, et le roi même.” They
 even began to take measures for that purpose: they formed a com-
 mittee for grievances, who drew up a remonstrance about them,
 which they presented to the Dauphin, the lieutenant and guardian
 of the realm; and he made an ordinance agreeable to their re-
 quests; which, if it had been put in due execution, and continued
 in force, would have laid a sure foundation for the liberty of the
 French nation [k].

BUT that politic prince, the Dauphin, soon found a way entirely
 to defeat all these measures of the estates, and even to make them
 lose, in a good measure, their credit with the nation; which was
 by setting the nobility and the third estate at variance. “ Les
 “ états se rassemblerent, au mois de Janvier de la même année, sans
 “ que l’ordre de la noblesse y voulut paroître, non plus qu’ à ceux
 “ qui furent tenus au mois de Febrier suivant. C’etoit un effect

[b] Boul. tom. iii. p. 99.

[i] Ibid. p. 119.

[k] Ibid. p. 113.

“ de la politique du Dauphin, qui regagna la noblesse par toute
 “ forte des caresses, pendant qu’il mettoit sourdement les villes en
 “ defiance contre elle, en leur faissant représenter, qu’il n’y avoit
 “ que l’autorité royale qui pût contenir la violence à laquelle
 “ elle étoit accoutumée: et il reussit si bien dans ses insinua-
 “ tions, que les villes et la noblesse négligerent également de s’unir
 “ et agir de concert pour le bien commun. On ne fut pas long
 “ tems après cela à voir l’effet des insinuations faites au peuple
 “ contre la noblesse: car tout à coup les communes de Picardie,
 “ de Vermandois, et de l’isle de France, commencerent à s’attrou-
 “ per, et dans l’idée que la noblesse n’étoit bonne à rien, où qu’elle
 “ n’étoit pas fidele au roi où au regent, ils firent main basse sous
 “ tous les gentils hommes qu’elles purent surprendre dans leur
 “ châteaux, avec des cruautés incroyables, jusqu’ à faire rotir un
 “ chevalier à la broche, et à contraindre sa femme et ses filles à
 “ manger sa chair.

“ Le regent n’avoit pas eû, sans doute, l’intention de pousser les
 “ choses si loin, et aussi fut il obligé de se servir de la noblesse
 “ même pour reprimer ce furieux mouvement. Il en coûta la
 “ vie à une infinité des villageois, qui furent tuez, et affommez,
 “ comme des bêtes, n’ayant aucunes armes ni art pour se défendre.
 “ Cependant les seditions continuant toujours dans la ville de Paris,
 “ il s’en fit à la fin un si considerable, qu’elle rétablit l’autorité de
 “ regent, par la mort du prévôt des marchands, et de divers autres
 “ qui pour avoir voulu porter trop loin l’indépendance et la liberté,
 “ firent perdre au public les avantages de leurs entreprises [1].”

MEZERAY says, that from this time we may date the end of the
 mixed government, which had continued, more or less, in France,
 from the beginning of the monarchy. He means the authority
 there was in the noblesse to be some check upon the crown.
 “ Ce qui arriva (dit Count Boul.) tant par le degout que l’on pris
 “ des violences populaires, qui l’on regardoit mal à propos comme
 “ l’effet des résolutions des derniers états; que parce que, la guerre
 “ ayant encore continué plus de 80 ans, l’autorité royale prit insensi-

[1] Count Boul. tom. iii. p. 117

“blement le dessus par l’obli des droits des particuliers, qui demeurent sans exercice au milieu de la confusion, et du desordre d’une guerre, qui pénétra dans toutes les parties du royaume.”

MEZERAY [m], speaking of the state of things in Paris and the rest of France, during the captivity of King John, says “pendant cette anarchie, la noblesse et les autres gents de guerre exerçoient toutes sortes de violence sur les pauvres peuples de la campagne. Ces malheureux batus, pillés, courus comme des bestes sauvages, n’ayant la pluspart pour retraite que les bois, les cavernes, et les marés. Ils s’attrouperent par grandes bandes, et se résolurent d’exterminer tous les gentilhommes. Cette fureur commença dans le Beauvoisis, et eut pour premier chef un paysan nommé Caillet. On la nomma la Jacquerie, parce que les gentilhommes, lors qu’ils pilloient le paysan, l’appelloient par raillerie Jacques bon homme. Si les villes se fussent jointes à ces rustres, c’étoit fait de la noblesse et de l’estat monarchique, aussi bien qu’en Suisse; mais pas une ne leur ouvrit leur portes de crainte d’estre pillée. Ils en tenterent plusieurs inutilement; mais du reste ils commirent tant de cruauté plus que brutales, que la noblesse de tous les partis, François, Anglois, et Navarrois, se rallia contre eux. Le roy de Navarre defit la troupe de Caillet. Le Dauphin en mit en pieces plus que vingt mille.”

Soon after, in 1358, “le Navarrois s’approcha de Paris; et harangua le peuple qui le declara son general, mais la noblesse, indignée de voir qu’il la caressoit moins que le bourgeoisie, l’abandonna, et dans une assemblée qui fut tenue à Compeigne, promit toute assistance au Dauphin pour assieger Paris.” This encouraged the Dauphin’s party, in the city of Paris, so much, that it got the upper hand; and so they drove out and punished the popular party with great severity, and entirely established the authority of the crown.

In the reign of Charles VI, A. D. 1382, there were found at the taking of Courtray, in Flanders, says Mezeray [n], “certaines lettres des Parisiens, faisant mention d’une ligue des villes de

[m] Tom. ii. p. 565.

[n] Abr. tom. ii. p. 610.

“ France avec celles de Flandres, pour l’extinction generale de la
 “ noblesse. En effet, depuis que le roy estoit sorti de France, les
 “ bourgeois des villes de Paris, de Rouen, de Troyes, d’Orleans, et
 “ plusieurs autres, avoient pris les armes à l’occasion des impôts ;
 “ tellement que les princes et les grands qui cherchoient à profiter
 “ des rançonnements et des confiscations, ayant facilement persuadé
 “ au roy, soit qu’il fut vray où non, que les peuples avoient con-
 “ spiré contre la royauté, ce jeune prince, par leur conseil, chastia
 “ rigoureusement ces villes, par la mort de grand nombre des gents,
 “ par proscriptions, revocations de privileges, et taxes excessives.”

THE Parisians came out with 30,000 men to meet the king, Charles VI, 1383, to shew their strength; but, at the word of command, they dispersed, and went home; and the king entered their city like a conqueror, took down their gates, took away their arms, and hanged, drowned, or beheaded a great number of them; and exacted of the rest more than one half of their goods: “ puis dans cette terreur on reſtablit les impôts, et on les leva avec
 “ des extortions indicibles. On traitta les autres villes de même ;
 “ et ces grandes sommes tournerent presque toutes au profit de la
 “ noblesse, qui les dissipant aussitôt en folles dispenses, justifioit en
 “ quelque sort les emotions que l’on chastioit si horriblement [o].”

IN the year 1384, “ Il s’en estoit encore soulevé d’autres payſans,
 “ aussi cruels que ceux de la Jacquerie, qui couroient le Poitou, le
 “ Berry, et l’Auvergne, et tuoient inhumainement tous ceux qu’ils
 “ trouvoient n’avoir pas les mains calleuses : on les nommoit les
 “ Tuchins. Le duc de Berry assembla des troupes, les dissipa, et
 “ fit mourir leurs chiefs avec plusieurs de ces rustres.” During the continuance of the reign of Charles VI, from the year 1401 to 1407, when the duke of Orleans was assassinated by the duke of Burgundy, and from thenceforth during all that reign, France was in very great disorder and confusion; and in the year 1413, Mezeray says, that the nobility, and those who had the care of the revenue, were rather desirous of a continuation of the troubles, that they might feast themselves upon the spoils of the people; and

[o] Mezeray, Abr. tom. ii. p. 611.

the courtiers, and those who were about the Dauphin, then but sixteen years of age, bred him up in all the notions of absolute power, "et lui mirent dans l'esprit que pour maîtriser absolument France, il falloit dompter Paris et disarmer les bourgeois, lesquels il taxeroit après comme il luy plairoit." Pursuant to this advice, the Dauphin immediately seized the bastile; which so enraged the citizens of Paris, that they immediately rose in arms, to the amount of 10,000, forced the Dauphin's officers from him and imprisoned them, and behaved themselves with great insolence both to him and to the king (Charles VI), and obliged them to consent to the putting to death several persons of the Dauphin's friends.

IN 1418, the Burgundian faction got the better at Paris, and made most terrible work with the opposite party of the Armagnacs or Orleanois; putting near 3000 of them to the sword. "Qui-
"conque avoit de l'argent où un ennemy, un office, où un bene-
"fice, estoit Armagnac." From A. D. 1401, to 1451, there were continual disorders, ravages, and a state of almost perpetual confusion and anarchy in France; first between the factions of Orleans and Burgundy, and afterwards between the French and English; the latter of whom were not quite driven out of France till 1451, when they had nothing left them but Calais and the county of Guisnes [p]. In 1444, Charles VII formed some standing troops in France: they consisted of 1500 gens d'armes, 4500 archers on horseback, and as many inferior soldiers or valets. Their pay or maintenance, according to Count Boulainvillers, was to be raised from the towns where they were in garrison and the neighbouring country; though the people afterwards consented, unthinkingly, to contribute settled sums for this purpose. "Le peuple, dit
"Mezeray, tom. ii. p. 699, qui ne sent que le mal present et qui
"ne veut point prévoir ceux de l'avenir, ne songea qu'à se liberer
"de ce fardeau, et octroya une taille d'argent pour le payement
"de ces gens d'armes, sans considerer que lors qu'elle seroit une
"fois establie, elle ne dépendroit plus de luy, ny pour la durée, ny
"pour l'augmentation."

[p] Mezeray, tom. ii. p. 705.

IN 1448, "Il y avoit peu d'infanterie en France; le roi (Charles VII) pour en avoir une bonne et bien entretenüe, ordonna que chaque village du royaume luyourniroit et payeroit un archer à pied qui seroit franc de toutes tailles et subsides. A cause de quoi on les nomma les Franks archers. Cela faisoit un corp de vingt-deux, ou vingt-trois mille hommes [q]." This prince was not only the first who formed standing armies in France, but, according to all the historians of that nation, was the first who gained that point of laying taxes upon the country at his pleasure, without the consent of the estates of the kingdom; but, in fact, he could not have carried his point, if he had not consented to grant certain pensions, to great numbers of the nobility, in lieu of what should be levied upon them.

IN the year 1465, in the beginning of the reign of Lewis IX, most of the princes of the blood, a great number of the nobility, and the old captains of the late king, entered into a confederacy for the reformation of the state, which was called the league for the public good. The dukes of Burgundy, Bretagne, and Charles the king's brother, were in it. The king, on the other hand, cajoles the burgeoises at Paris, and their husbands, by promising an abatement of taxes, and promises to govern by the council of six of the parliament, six of the university, and six of the citizens: this made the city stand firm to him, though some were much inclined to the princes. Mezeray [r], speaking of that which was called the league for the public good, in the reign of Lewis XI, says "le public qui avoit servy de couleur à cette guerre, et qui en avoit porté tous les frais n'en eut aucun avantage."

IN 1466, this prince, says Mezeray, "amusoit le peuple d'un espoir de soulagement, ayant convoqué à Paris une assemblée de notables, où il s'y fit, sans doute, plus de propositions qu'il n'en executer, et des discours fort estudiez; c'est ce qu'en France ils appellent de belle actions. Paris etant comme le fort du roy contre les grandes qui ne l'aymoient point." He made a review of them, towards the end of this year, and found between 70,000

[q] Mezeray, tom. ii. p. 700.

[r] Tom. ii. p. 722.

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and 80,000 men, fit to bear arms, between 16 and 60 years of age. In 1480, Lewis XI, says Mezeray, "soit qu'il ne se fust point
"à ses sujets naturels, ou pour quelque autre raison, cassa les
"Francs archers, et en leur place leva des troupes estrangeres, spécialement des Suisses." But this prince, a little before his death, was so well convinced of the unhappy situation of his kingdom, and of the misery to which he had reduced his subjects, that he exhorted his son, Charles VIII, "à reduire les levées des deniers
"à l'ancien ordre du royaume, qui estoit de n'en point faire sans
"l'octroy des peuples [s]."

In 1484, 2 Charles VIII, there was an assembly of the estates at Tours; and, says Mezeray, "On n'eut jamais si beau de reformer
"les abus, et de dresser des remparts contre l'oppression. Mais
"le president des etats, plusieurs ecclesiastiques, les deputez de
"Paris, et quelques autres, se laisserent emporter au vent de la
"cour, et trahirent la cause publique."

DURING the reign of Lewis XII, who came to the crown in 1498, and died in 1515, France had no reason to complain of the abuse of the authority of the crown, as to impositions. But Francis I, who in 1515 succeeded Lewis XII, by the advice of the Chancellor Du Prat, was put upon selling justice; by creating (says Mezeray [t]) a new chamber of twenty counsellors of the parliament of Paris, and as many in the other chambers in proportion; and as well upon augmenting the tailles, and making new imposts, "sans attendre l'octroy des etats, comme c'estoit l'ordre ancien du
"royaume." And the same author, speaking of the concordat, between this prince and the pope, made the following year, says
"le clergé de France, les universitez, les parlements, et tous les
"gens de bien y opposerent plaintes, remonstrances, protestations,
"appels au future concile. Toute fois au bout de deux ans, il
"falut ceder à l'autorité absoluë, et enregistrer le concordat au
"parlement. "In 1543," Francois I, fit un impost sur les villes
"closes, pour l'entretien de 50,000 hommes; qui ne cessa point
"avec la guerre, comme il avoit promis." In fact, the ministers

[s] Mezeray, tom. ii. p. 751.

[t] Tom. ii. p. 833.

of this prince broke through all the antient laws of France, "et poufferent l'autorité du roy jusque à une domination dés-
"reglée [*u*]."

THE succeeding princes all kept up this absolute power, more or less, according to their capacity, and other circumstances: but, in general, Henry IV, Lewis XIII, and Lewis XIV, brought it to perfection. However, it is somewhat wonderful, that in the reign of Henry III, when the violences of the league were carried to such a height, even against the person of the king avowedly, and when the deposing doctrines were publicly taught, the leaguers did not fall upon any measures to restrain the absolute power of the crown: indeed there was some talk of doing this in the estates at Blois, in 1588, and the Huguenots were in the same disposition. But nothing was done, either then, or afterwards by the leaguers in Paris, to this purpose. The duke of Mayenne, their chief, "considerant que l'esprit des auteurs de cette grande revolution
"tendoit à establir plutost un democratie qu'une royauté, travailla
"d'abord à diminuer leur puissance [*w*]."

And one may conclude that little of this sort could have been done with any effect, by the accounts we have of the state of the parties in France, at the beginning of Henry the Fourth's reign. Mezeray tells us, that, among other parties, there was one party "de gents trop amoureux
"de la liberté, qui tendoient à establir un government dans lequel
"l'autorité absoluë fust restrainée par des loix. Cette partie ne
"subsista pas long tems, toutes les autres, quoy qu'ennemies entre
"elles, conspirant à la rendre odieux et à la destruire."

AND afterwards, during the minority of Lewis XIV, when the princes and the parliament of Paris were united against cardinal Mazerine, and went great lengths against the court, yet nothing was done effectually, or hardly suffered to be proposed, that tended to promote the liberty of the people, or restrain the power of the crown: the princes of the blood and the great lords opposed every thing of this sort [*x*]. This has generally been, and is, the dis-

[*u*] Tom. ii. p. 932.

[*w*] Mezeray, tom. iii. p. 1199.

[*x*] See Mem. de Retz. tom. i. p. 163. 176. 180.

position of most of the noblesse; great numbers of them are very much reduced in their fortunes, but their high spirit, their love of expensive living, and their contempt and hatred of the merchants and trading people still remain; they know that the crown only can support them, to some degree, in their dignity; as in effect it does, by giving them places at court, commands in the army, governments, and other places; and, at the same time, by shewing a superior respect to them and their families.

THEY know, that if there were more freedom in France, it would turn to the advantage of the trading and lower classes of the people; therefore they will always be generally disposed to adhere to the crown, and assist it against the efforts of the middling people, between whom and them there still continues no small hatred; as was seen, in some measure, towards the latter end of the last century. Sir William Temple [y] gives us an account of a great insurrection in Britany; which, by the rage it begun with, might have proved of ill consequence to the French affairs, if it had met with a head answerable to it. But being only composed of the lower classes of people, who, from the oppression and ill usage they had sustained, hated and spoiled the noblesse, it was, partly by fair means and partly by foul, in a little time composed.

THE nobility therefore will always be for the crown; and so will the clergy; whom the crown politicly hindered from having their wings clipt at the reformation, and do still support them, as knowing they are likely to adhere to the royal prerogative: and the king will have a constant influence upon them, by the concordat, which gives the crown the nomination of benefices. Moreover the clergy will always influence the low people, and keep up, as they really do at present, a great spirit of veneration for their king. And there is so much of this now settled among all orders of men in France, that as the king is at present absolute to what degree he pleases, so that power seems to be fixed upon as firm a foundation, as in any country in Europe, even as in Spain itself.

[y] Mem. p. 38.

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THE change of the constitution, and loss of the liberties of Spain, were produced by much the same causes as they were in France. The nobility and gentry, in the former of these kingdoms, had been all along possessed of great privileges and immunities, particularly that great one of having their estates freed from taxes, in consideration of their doing personal service to the public, in war. In A. D. 1176, Alphonfus king of Castile, besieging Cuenea and wanting money “*curatumque ut non modo plebei*” “*homines et proletarii, sed etiam ingenui et immunes, quas vulgo*” “*Hispani Hidalgos vocant, quotannis quinos maravedinos aureos*” “*regio fisco inferrent.*” *Populum tot vectigalibus exhaustum belli* “*sumptibus imparem esse.*” *Debere eos patriæ caritate, ærarii in-* “*opia moveri ut de veteri libertate, jureque confiderent.*” *Didaci* “*conatibus, Petrus de Laræ obsistendum existimans, contractâ*” “*nobilium manu raptim è conventu discessit, armis tueri certus*” “*partam armis et virtute a majoribus immunitatem [z].*” The king was forced to desist, many of the greater nobility had their estates, and the dependences upon them very large. About the middle of the fourteenth century, in the time of Henry II, who was a bastard, and advanced to the throne instead of Peter the cruel; and in the time of Henry’s successors, the nobility got their privileges, estates, and jurisdictions much enlarged [a]. And Marian, lib. xvii. p. 710, says, “*a novo rege (Henric.) pro cujus-*” “*que autoritate dona principibus data oppida, arces, principatus:*” “*et in ea rerum perturbatione novus rex, quasi de alieno muni-*” “*ficus videri volebat.*” The same author says, that, in the year 1390, in the reign of King John of Castile, the noblesse would not agree to the king’s request, nor consent to be taxed. And, about the year 1393, in the minority of Henry III, or just when he became a major, he says, that “*datum est Cantabris expetentibus*” “*Castellæ exemplo (nondum enim mos ille sublatuſ erat) provo-*” “*candi jus ad singulare certamen, Marte arbitro, controversias quæ*” “*multæ in ea gente erant disjüdicandi [b].*”

[z] Marian. p. 536.

[a] Puffend. Introduc. p. 49.

[b] Marian. p. 755.

IN the assembly of estates at Madrid, in A. D. 1394, and in the beginning of the reign of Henry III. the pensions and other grants of Henry II were resumed; which highly vexed the grandees, and disposed them to make commotions. “*Beneventanus Madrito digressus in regia vectigalia ipsosque templorum redditus invadere non desistebat, regis ætatem ludibrio habens [c].*” This shews what power the grandees then had. The king (Henry III) went into Castile, “*ad pacandos procerum animos; qui, depulso belli timore, in miserorum fortunas grassabantur [d].*” But the king was obliged to give two or three of them large pensions.

IN Arragon, in A. D. 1406, the estates resolved “*Martinum regis filium primo quoque tempore in Hispaniam evocandum; ut hominibus maxime liberis, jus à natura datum, virtute, meritis, fide, fœdere, ac religione fundatum disceret conservare [e].*” In the beginning of the reign of Henry III, the king had been out a hunting, and at his return, hungry, found nothing in his palace for dinner. The master of the household told him, that there was neither money nor credit left to buy provisions for the royal household: and the king was obliged to pawn his cloke for a piece of mutton. But, at the same time, a number of the grandees used to have sumptuous entertainments for each other, in their turns: it happened to be, that night, the archbishop of Toledo’s turn. The king went thither in disguise, and found there great magnificence and plenty. After supper, when the grandees were merry, they began telling each other, how much every one had out of the royal revenues, which filled the king with astonishment; and the very next day he surprized and threatened them, and obliged them to give up the royal castles and territories which they possessed, and to pay all that they had taken of the royal revenues [f].

IN the reign of King John II, which begun A. D. 1407, and lasted till 1453, the kingdom of Castile was all along much troubled, with the divisions and commotions of the grandees, against

[c] Marian. p. 756.

[d] Ibid. p. 757.

[e] Ibid. 768.

[f] Ibid. p. 769.

Alvaro de Lunæ, the king's favorite, and against the king for protecting him. During this reign the power of the grandees must have been much increased; for, in 1439, the grandees of Castile formed a league against Alvaro de Lunæ, and gained their point against him, for a time, notwithstanding the king's authority. In 1449, the city of Toledo, upon occasion of a small tax that was to be raised upon them, by Alvaro de Lunæ, revolted against the king, and when he came before the town, they used him with great insolence; and those citizens who were distrusted by the rest, were used with great cruelty.

HENRY IV began to reign in Castile, in 1453, and died in 1471. In his reign, there was not a year passed without great disturbances. The king was impotent, and, in order to have children, he caused Bertrand de Cuera, count of Ledesma, to lye with his queen, of whom he got the princess Joanna: but to exclude this princess from the succession, the grandees form a conspiracy, depose Henry from the crown, and proclaim his brother Alphonfus king; who who soon after dies. But Henry's sister Isabella was married to prince Ferdinand of Arragon; who succeeds Henry after his death. The grandees of Castile, and even the citizens, treat Henry with great insolence and dishonour. "A conjuratis proceribus
" ingens facinus designatum." In A. D. 1465, "horret animus
" tantam nostræ gentis ignominiam recordari. Pro Abulæ mœni-
" bus in patenti campo suggestum ex materia ædificatum est, impo-
" sita Henrici statua, cum trabeâ, reliquoque regio ornatu. Con-
" venere procures infinitaque populi multitudo. Voce præconis
" gravissima Henrici crimina publicata. Ad singula sententiæ
" capita, statua figillatim omnibus regiis insignibus nudata, ac
" tandem cum verborum contumelia in præceps est data [g]." Hereupon Henry raises troops; but, not being able to do any thing, is forced to come to an accommodation with the malecontent grandees; who, by raising troops and making disturbances, not only obtain, from the weak king, what posts and other advantages they pleased, but even impose dishonourable terms upon

[g] Marian. lib. xxiii. cap. 10. p. 69.

him, and reduce him to great distress. They offer the crown to his sister Isabella, who refuses it, but is appointed successor to Henry.

AFTER Henry's death Isabella, and, in her right, her husband Ferdinand king of Arragon succeeded. This king hastened immediately into Castile, as knowing, says Marian. lib. xxiv. p. 92, that "*Castellæ proceres fide et opera venali nisi magnis præmiis perstituri in officio non erant.*" Ferdinand had much to do to quiet and reduce the proceres of Castile, "*reliquis castellæ partibus quiescentibus, motus in Bætica extabant. Proceres pro se quisque urbes arcesque præsidiis occupare: ut cujusque vires erant; prædæ, rempublicam, ludibrio majestatem habere [b].*" Marian. tells us, in the sequel of the same chapter, that, notwithstanding the vigilance of this king, the grandeses seized several considerable places, and even the citizens were divided into parties, and raising tumults. In 1481, "*sub Ferdinando et Isabella, Toleti generalis conventus agitati omnino frequentes. Voces liberæ fuerunt, et plenæ expostulationum: nobiles in tenuiorum fortunas grassari populi conquerebantur. Eorum avaritia regium ærarium exhaustum, occupata vectigalia, imperari nova indies magnæ provinciæ calamitate. Remedium excogitatum dati in causâ judices, ab Henrico rege factas imprudenter donationes, aut temporum necessitate extortas, injustas fore pronunciarunt. Nobilium audacia coerceri nondum poterat, neque judicia restitui magnopere labefactata [i].*" Marian. farther informs us, that the nobility of Portugal had, many of them, the haute justice in their territories, and greatly resented that the king's officers should exercise any jurisdiction therein; and it is to be supposed that the nobility of Spain enjoyed the same privilege.

BUT we find, that not only the nobility, but even the citizens, were concerned in raising those tumults and civil wars; for this same author tells us, that King Ferdinand severely punished some of the chief citizens of Saragossa, who had been the cause of putting one of the king's officers to death, for doing his duty; and, more-

[b] Marian. lib. xxiv. p. 104.

[i] Ibid. p. 111.

ever, that, in the year 1447, he gained the point of altering the manner of creating the city magistrates, which used to be by the citizens themselves, and had that authority vested in the crown, which was a great remedy against tumults.

IN 1488, Ferdinand recovered Placentia from the family of Stunica, who had obtained it from the crown, in the reign of some of the former weak kings. "Magnus (ex eo) procerum timor, ne quæ perturbatione temporum superioribus, regibus extorserant, restituere cogerentur regi, majori potentia consilioque [k]." This was in Castile. In Arragon, at the same time, "novi tumultus extabant. Proceres civitatum societatem nuper initam, disturbare cogitabant quasi gravem, nimiumque privatis ipsorum commodis obfistentem: neque prius restiterunt, quam eâ societate in decem annos abrogata, comitiis Turiasone habitis consequentibus annis [l]." In this same year, Ferdinand obtained likewise the mastership of the order of Calatrava to be united to the crown of Castile, and soon after the mastership of the other two military orders; which union was a great increase of power to the crown; insomuch that Marian. says, this prince was "acer, impiger, solers, cautus, in acie ferox, post victoriam mitis."

IN 1493 "reg. Ferdinand. et Isab. nihil in hunc præclarius indicit, eâ mutatione quæ in tribus sacris militaribus castellæ ordinibus facta est. Multum ii milites juverant Mauris ex universa Hispaniâ deturbandis impio imperio evertendo: genere et factis nobilissimi, strenui, pugnaces. Confecto Granatensi bello, cum jam parum terroris ab hoste esset, pro gratiâ odium redditum. Dolebant reges ab eorum potestate magistros ordinum esse liberos, iis opibus eâque auctoritate ut regibus formidabiles essent, tumultus et bella sæpe in provincia concitarent. Ea species facto est prætenta, vera an conficta non disputamus. Certe in comitiis non lex et æquitas sæpe valebant, sed vis et ambitus. Itaque ab Innocentio octavo diploma est ablatum, qua sublatiis magistris eorum ordinum administratio procuratioque omnis regibus credebatur." So the orders were, this year,

[k] Marian. lib. xxv. cap. 12. p. 133.

[l] Ibid.

united to the crown, for Ferdinand's life; and, in the time of Charles V, Hadrian VI united them for ever to the crown; and granted to him and his successors, "*jus præsentandi episcopos Hispaniæ qui ante ad eorum supplicationem precario a pontificibus Romanis instituebantur* [*m*]."

AFTER Isabella's death, when Ferdinand retired out of Castile, the impolitic management of Philip, husband to Queen Joanna, brought him into much contempt with the proceres; so much that Marian. says, "*ex eo novus rex (Philippus) contemptui esse cœpit, prorsus ut Garfiam lassum, cum maxime vellet, neque regio consilio præficere, neque Ferdinando filio institorem adhibere potuerit, procerum intercessione eo conatu impedito* [*n*]. Philip dying soon after he came into Spain, and there being great disputes who should have the regency, not only the proceres had again an opportunity of making disturbances, and gaining the best terms they could from Ferdinand, but even the citizens, in different parts, raised commotions and disturbances amongst themselves. But, in the year 1507, during Queen Joan's madness, and while Ferdinand was in Italy, things in Spain were in great confusion. The council had no authority; the proceres were all ready to break out into quarrels: nobody obeyed but those that would: there were disturbances, even to plunderings and slaughter, between different parties, in the cities of Toledo and Madrid; and the like in divers other cities and parts of Spain, almost universal disorder.

To put a stop to those disorders, Ferdinand begins by gaining two or three of the proceres, or grandees, by large grants to them; and so made his party stronger. Then he proceeded to reconcile others, and to subdue those that were most refractory; and, at length, he recovered several considerable castles and cities to the crown. But to such a height of insolence and power were the grandees arrived, in those days, that the marquis of Priego seized and imprisoned the king's judges at Corduba. But the king severely punished both him and his associates for so doing, after he

[*m*] Marian. lib. xxv. p. 150.

[*n*] Ibid. p. 255.

had subdued the other refractory grandees. The proceres of Arragon, in a convention of the estates, in 1515, would not grant any money to Ferdinand, "*nisi subditis populis præcisa facultate regiam opem per appellationem (ab eorum judiciis) implorandi* [o]."

ONE sees from these extracts of Mariana, &c. that, in the fourteenth and fifteenth centuries, the nobles of Spain, especially the more eminent of them, were possessed of so great immunities, privileges, powers, and jurisdictions, that they not only were able to bear very hard upon their vassals, and upon all the lower sort of people about them, but they could, upon any occasion, make great disturbances and oppositions against the crown itself. At the same time, the citizens and burghers, though subject indeed to these oppressions from the nobility, yet had still preserved that eminent privilege, which several of them seem to have had from the recovery of Spain from the Moors, of sending deputies to the cortes, or general meeting of the states, and of giving their consent to all extraordinary taxes, which, otherwise, ought not to be raised upon them.

INDEED, by too great carelessness in the exercise of this right, they had suffered several impositions or excises, that were at first granted but for a time, to grow into a custom, and pass for a part of the settled revenue of the crown. In consequence of which, the cortes were not summoned so often, or so regularly, as they would otherwise have been; but still, even in the reign of Ferdinand and Isabella, and in the beginning of that of Charles V, this privilege was not contested by the crown: it was acknowledged, that no extraordinary supplies of money could be legally levied upon the people, but by the consent of the procurators in the cortes.

MUCH about the same time, the discovery of the East-Indies, and of America, brought great wealth into Spain, which being chiefly diffused among the citizens, or third estate, rendered them more considerable, and of greater weight in the constitution. In

[o] Marian. lib. xxx. p. 340.

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these circumstances, if the citizens and people had adhered to the nobility, and the nobility, without oppressing them themselves, had afforded them the protection they might have done, against the attempts of the crown, the liberty of the kingdom might easily have been preserved.

BUT, for want of this union and concert, the power of the nobility was first broke in upon, by Ferdinand the catholic; who, after the conquest of Granada, several times humbled the pride of the great men, by resuming the too liberal grants of Henry IV, taking many of their strongest castles and most important principalities, and jurisdictions, from them; by taking to himself, by grant of the pope, the three great masterhips of the sacred military orders: which were afterwards, in Charles the Sixth's time, united to the crown for ever, and were a very great increase of power to it.

THE power of the nobility was yet more broke by the address and courage of Cardinal Ximenes, who had the administration, or regency of Castile, after the death of Ferdinand. This great politician saw, that this was the first and greatest point the crown had to gain; and he took several ways to do it. One was to retrench the salaries of useless people, and to resume the crown grants. But the principal one was, to form a standing militia out of the inhabitants of the several cities, to whom officers and ammunition were to be found at the expence of the crown; who were to have several privileges for this service, particularly an exemption from quartering the king's household, &c. and were to be reviewed every Sunday [p]. This establishment was very pleasing to the people, and accordingly, in a very short time, more than 30,000 select soldiers were drawn together out of the cities; but it was equally displeasing to the nobility, "ut populus ignobilis, auctoritate publicâ armaretur ad nobilitatem evertendam et vastandam [q]." By these and other arguments of the nobility, many cities were led to oppose it. The Pintians were so especially, who were encouraged by the neighbouring grandees, and even by some of the

[p] Gomez, p. 1081

[q] Ibid. p. 1082.

council of regency : but their discontents, and the effects of them, were soon suppressed by Ximenes.

THE advantage of these public soldiers appeared on several occasions, as particularly against the insolence of a parcel of young noblemen, who hindered the execution of a sentence by a court of judicature, and affronted its officers. In fact, Ximenes kept all the grandees in awe ; and when any of them proved refractory, he employed the public militia to oblige them to submit.

WHEN Charles V was called into Germany, to take upon him his new dignity of emperor, he sent Cardinal Adrian into Valencia in his stead, about the year 1518 ; but the cardinal found that city in great confusion : the citizens having before turned all the nobles, save one whom they said was an honest man, out of the city. They told the cardinal that the tyranny of the nobles was insupportable to men who were free-born : and accordingly they dispatched a substantial shoemaker and a carpenter as their commissioners to the king [r]. Charles V demanded such large sums of money of the cortes, and, at the same time, did so many things which they thought contrary to the honour and advantage of the Spanish nation ; that, though at the cortes at the Groyne, the sums demanded by the court were given by a majority of the third state, who had been bribed by promises, &c. yet many of the cities were not the less discontented with those grants, and with the nobles for complying with them : they called them Chivres's journeymen, who, so they could but have a share of its spoils, did not care how much their country was plundered by foreigners [s]. The people, in many places, rose upon and killed the procurators, who had consented to the new donative.

THE clergy, irritated with the king's making a young foreigner archbishop of Toledo, were generally on the side of the discontented commons ; though only the bishop of Zamora, and a few of the inferior clergy, declared themselves openly on that side. And though few of the nobles did ever join with the commons, yet none of them acted vigorously against them, till they were forced

[r] Geddes, vol. i. p. 248.

[s] Ibid. vol. i. p. 253.

out of that neutrality, by the cardinal's threatening them with a resumption of all the crown lands [t].

THE associated cities, which were many, formed a junta, to which they sent procurators, as to a cortes: which junta required Cardinal Adrian, the king's viceroy, to desist from acting in that quality; and published a manifesto, in their own justification, for having taken up arms [u]. Hereupon the admiral of Castile raises an army against the commons; and the Biscaineers sent Cardinal Adrian some troops for his guards, with an offer of more, to reduce the Castilians to their obedience. Soon after this the commons grew suspicious of their leader Giron, because of his being related to many of the grandees, whom they looked upon as their most dangerous enemies; and the admiral of Castile took Tordesillas by assault, and in it most of the procurators. Whereupon the commons formed a select council, who pretended to have an extraordinary respect and zeal for the king's person, and said they would make him greater than any of his predecessors, by resuming the crown lands from the nobles.

THEY seemed to have dropt their quarrel against the northern minister, to fall the heavier upon the nobles. They declared they would no longer bear the whole charge of the government, which had been thrown by the nobles upon the commons, by the former having robbed the crown of most or all its antient demesne lands [w]. In their letter to the nobles (Geddes, *ibid.* p. 325.) they say, that the nobles have robbed the crown of all its antient demesne lands and revenues, and that the great riches of the nobility, and the poverty of the crown, are visibly the great and standing grievance of the kingdom; therefore, before the commons will lay down their arms, they are resolved to have all the alienated lands and revenues restored to the crown.

THUS ended the last treaty between the nobles and the commons; the differences afterwards being left to the sword to decide. The army of the commons being raw undisciplined soldiers, and their generals unexperienced, made little or no defence against the

[t] Geddes, vol. i. p. 259.

[u] *Ibid.* p. 262.

[w] *Ibid.* p. 315.

crown armies, but were every where strangely intimidated. They shewed at first great heat and violence, but in the process no conduct, and in the conclusion a very faint and servile spirit. On the 10th February 1522, Toledo submitted, and thus ended the commons wars; which began in April 1520: neither did the wars of the commons of Valencia last much longer, which, having been all along carried on with much greater fury and devastations than that of Castile, ended in a great slaughter of the commons, in a field of battle.

IN the cortes at Valedolid, in 1522 or 1523, the procurators applied strongly to Charles V, to have the giving money postponed to the consideration of the national grievances, which, they said, was the antient and most reasonable custom: but, being told by the king, that it was in vain to struggle with him for a thing which he was resolved never to grant, they gave it over, and presently voted the sum desired by the court [x].

AFTER the crown and its ministers had made use of the arms of the commons to humble the pride of the nobles, they gave the nobles an opportunity of revenging themselves upon the commons; for, at Charles V. coming into Spain, there were such unusual demands, and extorsive illegal practices by his ministers, as greatly dissatisfied most of the nation, especially the generality of the commons. They took arms, and most of the chief cities of Castile, which send representatives to a cortes, associated themselves, took arms, and declared for the commons: and some even of the nobility and gentry joined with them at first; and others, who did not declare openly against them, were thought to favour them, and would have acted more openly in length of time, if the commons had used them well. But there was too inveterate an animosity between the nobles and commons for them to act long in concert: the commons soon began to threaten the nobles with a resumption of all the crown lands they possessed, which must have tended to their great impoverishment. And while they made but faint opposition to the authority of the crown, and even seemed to

[x] Geddes, *ibid.* p. 353.

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have a secret awe of it, they actually made proposals to it, to enrich it to a great degree, by a resumption of all the crown lands: for want of which it was forced to burden the commons with taxes. One sees here how poor politicians the commons were, to propose such a resumption as would probably have made the crown absolute, out of resentment against the nobility: they declared, they would not lay down their arms till the resumption of the crown lands should be actually made, from the nobility.

UPON this, the nobility joined together, and acted openly against them; they joined the crown army brought out of Navarre, and gave battle to the commons: or, to say the truth, the latter were routed and broke to pieces, without so much as striking a stroke.

THINGS had the same issue in the kingdom of Valencia, where many of the nobility at first joined in the commotions; but they were there too made to desert the party, by the animosity, or rather rage, of the commons against them; who threatened to extirpate them all. They therefore joined with the king's forces to quell the commons; and when these commotions were suppressed, and the royal power thus strengthened, by the accession of the nobles, it has ever since been increasing. For the nobles, having been sinking in their estates and power, the crown has been ever since taking their privileges from them; and, by degrees, the crown revenue is so established, that they have no need of any cortes: it has got the power of heightening its revenues as it pleases: the management of the Indian treasure is wholly at its disposal; and the church revenues are in a great measure so: and the churchmen with the inquisition are continually inspiring all ranks of men with a servile disposition, and an awful reverence to all the king's commands. And to crown all, the king has a standing army of as many troops as he pleases. So that the crown of Spain is now as absolute, and its authority as much settled in the hearts of the people, as that of any power in Europe.

SECT.

S E C T. III.

Denmark and Sweden.

AMONGST the circumstances in which the two northern kingdoms, of Denmark and Sweden, differed from those of France and Spain, one was, that, the two former countries not having been conquered by any invaders, the Bourgeois and Peasants, in them, were always upon a much better foot than they were in the latter. They had very early, and probably from the beginning of those kingdoms, a share in the legislature. For as to Sweden, Joannes Magnus [y] says, that “*præter equestrem ordinem, ecclesiasticorum, civium, et agricolarum ordinis ad comitia vocandorum expressa mentio.*” And from Eric Upsal, lib. vi. Hist. Suecan. p. 327. “*tempore præfato accedunt ad comitia Stockholmienſia, episcopi, prælati, milites, liberti, equeſtris et nobilium ordo, et rusticorum et civitatum nuncii speciales.*” And, in Snorro Sturlonides, we have several instances of the northern kings being elected in public assemblies, where the people were present, and gave their consent.

AND, as to Denmark, Pontanus tells us, that “*Ericus Rex Daniae (A. D. 1096) nunquam ex procerum aut popularium coetu solitus erat discedere nisi salutatis singulis [z].*” Regnante Nicolao, A. D. 1134, indictis Ringſtadii comitiis, magnus par-
 ricidii et cædis reus peragitur. Nicolaus pater (who was then king) populi et procerum studia metuens, &c. rex (Nicolaus) ita concione petita haud aliter pacare patrum et populi animos potuit, quam ut magni abdicatâ præſentiâ eum domo ac patriâ excessurum, nec unquam, nisi regno et proceribus volentibus, rediturum jure jurando firmaret. Regem autem juramenti poenitere cœpit.” It was represented to him “*teterrime sibi consuluisse quod unicum filium, eumque in spem regni educatum, levibus agrestium judiciis permisisset: ipsumque hoc sibi potius refer-*

[y] Lib. i. cap. 4. art. 16. LL. Provinc. Suec. de Rege.

[z] Pontan. lib. v. p. 201.

“vare oportuisse et patrum judicio, non populi aut procerum suffragiis revertendi jus atque arbitrium deferri debuisse [a].” In consequence of their having this share of the legislature, they were possessed of greater privileges, more freedom and spirit; and preserved them longer than the French and Spaniards did. And they might have enjoyed them to this day, if they could have preserved a balance, and good understanding, between the two orders of the nobility and people.

BUT this balance was first broke in Denmark, by the exorbitant growth and aggrandisement of the nobility, in the beginning and process of the sixteenth century. The nobles, who had always considerable prerogatives in that kingdom, much increased their wealth and power, by the spoils they got in Sweden, while this latter crown was united, or rather subject, in some measure, to that of Denmark. The nobles had some time before been acquiring new degrees of authority over the peasants; and had used them very oppressively. In the year 1418, under Eric X, “les paisans du Jutland se revolterent contre la noblesse, qu'ils accusoient de tyrannie, et de les accabler d'impots insupportables. La defection fut si generale dans cette partie de Dannemarc, que ni la douceur, ni la violence ne furent pas capables de la repri- mer. Enfin les choses furent poussees si loin, que la plus grande partie de la noblesse fut contrainte de se mettre sous la protection de la maison de Holstein, à fin de se soutenir à la feureur des paisans [b].”

THEY soon after gained a more considerable degree of power against the crown, by deposing Eric the Pomeranian, for no great cause, and electing Christopher of Bavaria; under whose conduct they beat and dispersed an army of peasants in Jutland, who had assembled together out of hatred to their lords, and some affection to their deposed King Eric [c]. The nobles afterwards obliged Christopher to send out of the kingdom all the German strangers he had invited thither, and to whom he had given fiefs, castles, &c. but, as I have already observed, one of the chief causes of the

[a] Pontan. lib. v. p. 201.

[b] Hist. Dannemarc, tom. iv. p. 156.

[c] Ibid. p. 167. 187.

aggrandisement of the noblesse, was the wealth they acquired while Sweden was united to Denmark: another was, the influence they had in the deposing of Christian II, with whom they made a contract for the preservation of their privileges, and electing Frederic I king in his room; which was done in 1523. Under the reign of which latter king (says the author of the Memoirs of Denmark, p. 8, 9.) it was, that the nobility of that country made the greatest step to the grandeur they attained to afterwards: for they, while Christian II and Frederick were contending for the crown, took the opportunity to prescribe such rules to the last, as to advance their power, not only above that of the other estates, but even above the royal prerogatives.

KING Frederick I was looked upon, by all understanding people, as a prince who had a greater share of piety than of policy; when he suffered the reformation of Luther to be introduced into that kingdom, at a time when the nobility were already overgrown in riches and power: he did it in concert with the nobility [d]. It being evident, that the power of the bishops and prelates, who hitherto had kept up, in some measure, the balance, being fallen with their revenues, this must needs be the greatest step that could be made by the nobility towards advancing themselves, not only far above the clergy, but also above the other estates. It is easily to be imagined, that the royal prerogatives, being brought into so narrow bounds as they were, and the clergy's authority in a manner quite abolished, the corporations alone were not able to resist long against those, who, sitting at the helm, had the chief management of all affairs of moment. And the peasantry having, for the most part, an entire dependance upon the nobility, as being partly their tenants, and partly their vassals, were not in a condition of making so much as the least shew of resistance against those who were their lords and masters. Thus indeed the name of the four antient estates of Denmark, to wit, the nobility, clergy, citizens, and peasants remained; whilst all the authority and power was effectually lodged in the first: which, in the succeeding reigns,

[d] Hist. Dannemarc, tom. v. p. 30.

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did increase to such a degree as proved intolerable to the other
estates, and brought the whole kingdom to the brink of de-
struction.

THOUGH Frederick I encouraged the reformation, and gave the
teachers of it liberty to preach publicly, &c. yet it was not before
Christian the Third's time, in 1537, that the popish establishment,
and the wealth and power of the prelates, was quite ruined, at
the estates at Odensee. The bishops were then imprisoned, and
deprived from their sees and revenues [e]. Most authors, who have
wrote of those transactions, agree, that the aggrandisement, which
the nobility had from the subversion of the popish hierarchy, was
a great cause of endangering the crown and the kingdom. The
author of the Hist. Dannemarc particularly expresses himself in
nearly the foregoing words, and then goes on as follows: "non
"seulement toutes les places des senateurs, et les principales
"charges de la cour, étoient entre les mains des gentils hommes;
"ils prétendirent encore être maîtres de toutes les autres: de sorte
"que le roi ne pouvoit disposer d'aucun employ de quelque im-
"portance, même en faveur de la noblesse sans la consulter.
"Ils ne s'entinrent pas la. Ils l'attribuerent le privilege de nom-
"mer les magistrats de presque toutes les villes du royaume:
"et priverent les autres ordres tant ecclesiastiques que séculiers du
"droit d'acheter des terres dans le royaume. Ils porterent même
"les choses si loin, que si une terre venoit à tomber, par hypo-
"theque ou par quelque autre titre, entre les mains d'un particu-
"lier, il étoit obligé par une proclamation annuelle d'en offrir la
"vente à la noblesse sur le même pied qu'il en avoit obtenu la
"possession. Ainsi les bourgeois des villes et les paysans se virent
"reduit à une dépendance absolue de la noblesse; et les eccle-
"siastiques à se soumettre à sa volonté par le droit que la possession
"des terres leur donnoit de nommer au benefices."

By these means the nobility had brought the commonalty quite
under subjection: they loaded them with taxes, and exempted
themselves as far as possible. They even used the protestant clergy

[e] Hist. Dannemarc, tom. v. p. 129.

very ill, who (says Polit. Essay, p. 101.) had groaned under the lash of many arbitrary impositions from the nobility. By possessing themselves of the principal charges in the state, as those of counsellors, governors of provinces and forts, and the like, and behaving very ill in them, and consequently with ill success, they increased the animosity of the people against them.

FREDERICK II, son and successor to Christian III, being a mild prince and entangled with a war with Sweden, was not in a condition to oppose the encroachments of the nobility. His son Christian IV, who succeeded him, in 1588, intended it; but having been unsuccessful in Germany, that disgrace broke all his measures at home. The nobility, who dreaded his designs, thwarted him on all occasions: especially by exempting themselves, as much as possible, from taxes and other burdens; which, consequently, falling upon the commons, who were not alone in a condition to provide for the security of the kingdom: this encouraged the Swedes to fall upon it, and bring it into great danger; so that Christian IV, who died in 1648, left them in great confusion. Besides that prince had married several of his daughters, by a second ventre, to some of the chief of the Danish nobility. This increased their spirits, and made them think of excluding Frederick III, who was the eldest surviving son of Christian IV, and raising his younger brother Woolman to the throne; however they could not gain this point. But before they would admit Frederick III to the throne, they reduced the royal prerogatives, as well as the privileges of the commons, to such narrow bounds, that of the first there was nothing but the royal title left; and the last were excluded from all employments, not excepting military ones.

BUT, at the siege of Copenhagen, in the year 1659, the nobles, finding themselves and the whole kingdom in great distress and danger, began to change their tune, and court those whom they had despised and oppressed before. They promised the citizens of Copenhagen a vote in all public consultations; a privilege to purchase lands and lordships, and to enjoy them with the same rights as the nobles did; and to be burthened with no taxes except such as the nobility did pay, and that not without public consent: be-

sides

fides which, they were to be free from all quarterings of soldiers in time of peace, and their children to be capable of bearing all places of honour and profit, equally with noblemen's sons [f]. But as soon as their distress and danger was over, and peace was made with Sweden, the nobility, in the assembly of estates, held in 1660, to consult about remedying the disorders, caused by such unsuccessful wars, returned to their old oppressive dispositions, and way of acting. The army was to be paid and discharged: there was little money in the kingdom: the lower and middling sort of people had been exceedingly harrassed and impoverished by the wars, the ill success of which had been chiefly owing to the ill conduct and cowardice of many of the nobility, who had posts in the state and in the army. Yet, notwithstanding all this, the nobles appeared very little sensible of the public calamity: they would not abate an ace of their pretended prerogative: they were resolute to lay the whole burden of discharging the soldiers, and repairing the losses sustained in the late war, upon the shoulders of the two other estates, the clergy and the commonalty.

This caused great animosities and warm debates in the estates; the speaker of the commons reproached the nobility with their having been the occasion of the kingdom's calamity, and said the least they could do was to bear their proportion in the taxes that were to be raised. But the nobility, having answered in terms of great vehemence and contumely, treating the commons but as their vassals or slaves; the commons, fired at this usage, resolved to separate themselves from the nobility, and to consult about ways of putting themselves upon a better foot, or at least of humbling the nobility: and they thought the best way to do it, was to offer an hereditary, and absolute, right of government to the king: this course was approved by a general court both of the commonalty and the clergy. They pursued this plan; and had it in their power to make it effectual, without the consent of the nobility, by having engaged in their party, the court, the clergy, and the army [g].

[f] Mem. of Denmark, p. 15.

[g] Ibid. p. 21.

AND the nobility not complying at first, the clergy and the commons, headed by the bishop of Copenhagen and the speaker, went forthwith to court, and being conducted to the king's presence, the bishop, in the name of the clergy and commons, offered the king the hereditary crown, and an absolute sovereignty, without limitation. The king thanked them; but said it was necessary the nobility should concur with them, as he believed they would. Some of the nobles would have got away; but the gates of the city were shut up by the king's order: and the whole body of the nobility, being then afraid to be called to an account for their late ill conduct by the estates, who were now backed by the court and the army, at length resolved to comply, and join with the commons in a surrender of absolute monarchy to the king, who accepted of it; and it was accordingly with great and public solemnity vested in him: not one of the nobles venturing to make a protestation for the saving of their rights. So that now the royal authority in Denmark is as absolute as it is in France or Spain.

SWEDEN was the country in which the old Gothic constitution remained the longest; at least in some degree. For though Gustavus Ericson did, in the estates of Sweden, in 1544, procure the crown, which he had acquired himself, to be made hereditary in his family, and did also, during his life, govern in most things according to his pleasure; because, by having taken from the clergy, and reunited to the crown, above 13,000 farms, he, with the revenue of them, and with the church plate, was enabled to maintain a standing army, the officers of which were for the most part Germans and Lutherans, without having any recourse to the estates; yet still the free constitution in some degree remained [b]. For his son Eric was deposed by the estates, in 1568; and, after him, his brother John, in order to get the consent of the senate of Sweden to his son Sigismund's accepting the crown of Poland, agreed to conditions prescribed by the senate, which were disadvantageous to the royal authority. And this Sigismund, after he

[b] See Pol. Essay, p. 27.

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came to the throne of Sweden, in 1597, was also deposed in an assembly of the estates of that kingdom, at Stockholm, in 1599. Charles IX, who was the last of the sons of Gustavus Ericson, was, after he came to the crown, in 1604, very much engaged in wars, and not very fortunate; and his son Gustavus Adolphus, though victorious abroad, and able to subsist his army of 70,000 men, without having recourse to the estates, was yet very benevolent, and willing to encourage the nobility, and maintain the constitution of his country. The reign of Queen Christiana, his daughter, which began in 1633, though very successful in the German wars, yet was managed chiefly under the conduct and administration of the principal of the nobility: and Charles Gustavus, her cousin and successor, being greatly obliged to the states for acknowledging him, bound himself by the most solemn oaths to maintain their liberties and privileges: therefore, at the accession of Charles XI, in 1660, the kingdom of Sweden might be said to have retained, in a considerable measure, a free constitution; with a title to meetings of its estates, and privileges enjoyed by all the four orders, of nobility, clergy, bourgeois, and peasants.

It was this last prince that gave the finishing stroke to the remaining liberties of that kingdom. And he did it principally by taking advantage of the like dissension and animosity between the nobility and the other orders of the kingdom, which we have found to have occasioned the loss of the liberties of the people in France and Spain, and Denmark. This animosity had been breeding and increasing between the two orders, for some time before: the nobles, in the reign of Queen Christiana, were in great power and a very flourishing condition, by the wealth they had acquired in Germany, by the many and important charges they possessed in the state, and by the many crown lands they enjoyed. Many of these crown lands they got in the course, and towards the end of the German war, by the peace of Munster; when the crown of Sweden, being straitened for money, after the battle of Norlingen, was obliged to sell to the nobles great quantities of crown lands, at very cheap rates [i].

[i] Hist. Sweden, lib. i. p. 193.

As these crown lands made a great accession of opulence and grandeur to the noblesse, so they raised against them, the envy and discontent of the three other orders, the clergy, the burghers, and the peasants. “Les ecclesiastiques, les bourgeois, et les paisans, portoient trop d’envie à la noblesse pour ne pas embrasser avec joye toutes les occasions de la ruiner. Outre que ces trois ordres assemblez surpassoient toujours le quatrieme en nombre des suffrages, ils avoient une raison commune d’abaisser la noblesse dont l’opulence ne tournoit jamais qu’à leur oppression. C’etoit d’être moins chargez d’impôts à proportion du contingent auquel on obligerait les gentil hommes [k].” Accordingly the states, upon Queen Christiana’s requesting of them a supply, proposed to her to resume the crown lands from the nobles, of whose luxury and pride the three other orders complained, while they were overburdened with the charges of the public: however, they could not, at that time, gain their point against the noblesse. But their animosity against them still continued; and, in the reign of Charles Gustavus, successor to Christiana, they again made instances to the king, for a resumption of the crown lands from the nobles, which they would have had to extend as far back as 1604. And they so far gained their point, that a resumption was actually made of many though not all the grants of the crown lands, that had been given since the death of Gustavus Adolphus [l].

BUT, in the reign of Charles XI, this point was quite finished: the senators and nobles having mismanaged the public affairs, during the minority of that prince, and the kingdom being exhausted by the unsuccessful wars they had undertaken; he, in 1680, called an assembly of the estates at Stockholm, and therein, chiefly by making use of the animosity subsisting between the three other orders, and the senate and nobles, he gained the point of an entire resumption of the crown lands.

IN the time of the assembly, the king indeed had his regiment of guards, consisting of 2000 foot, in the city of Stockholm, whose colonel and principal officers were Livonians. Moreover his ma-

[k] Hist. Sweden, lib. i. p. 203. [l] Ibid. p. 213.

jeſty forbid ſeveral of the moſt conſiderable nobility to be preſent at the eſtates; and alſo gave the title and rank of barons to ſeveral generals and colonels of the army, in order to have the more votes in the chamber of the nobles. But the principal means of effecting his purpoſes, was his having the three lower orders of the eſtates entirely with him againſt the nobility, who were to be chiefly affected, by the reſumption of the crown lands. The peaſants preſented memorials to the king to ſolicit the reſumption: “ les clergé, les bourgeois, et les paſſans, ſe laiſſerent aiſement perſuader que les maux qu’ils avoient ſouffertes ne venoient que de la trop grande autorité des nobleſſe. Ils étoient bien aiſes d’ailleurs d’avoir occaſion d’abaiffer la nobleſſe, toujours fiere et imperieuſe dans la proſperité, ſ’imaginant que le fardeau qui tomberoit ſur elle étoit autant de ſoulagement de leur propre miſere [m].”

THERE were deputies choſen out of the eſtates to examine what ground there was for the authority the ſenate had exerciſed; who declared that the king was not obliged to lay any affairs before the ſenate but what he pleaſed [n]. The eſtates alſo declared that the king, who held his crown from none but God, was accountable to God only for his conduct. There were commiſſioners eſtabliſhed out of the ſeveral orders, to examine the conduct and adminiſtration of the ſenators and nobleſſe, who were choſen out of all the orders of the eſtates. Theſe commiſſioners, beſides making ſtrict reſumptions of the crown lands, which in ſome families amounted to very great revenues; (particularly Count Conigſmark alone was to loſe near 26,000 crowns per annum) they alſo adjudged thoſe who had poſſeſſed them to pay great ſums of money, by way of ſatiſfaction, for the profits they had received from them.

THE eſtates alſo, at the ſame time, conſented to taxes for the equipping and maintaining the fleet; and alſo for recruiting the army: the nobleſſe alſo agreed to contribute in proportion. There was a reſumption of all counties, lordſhips, or lands, alienated or granted from the crown ſince the year 1604, above the value of 600

[m] Hiſt. Sweden, liv. ii. p. 146.

[n] Ibid. p. 149, 150.

rixdollers a year, and all the ecclesiastical revenues in Livonia that had been formerly annexed or given to the crown. The clergy also granted the fifth penny of their revenue.

ANOTHER assembly of estates was held in 1682; wherein were passed several resolutions, in confirmation of what had been done in the former assembly. The nobles opposed themselves strongly to these resolutions; but in vain. The estates confirmed the absolute and independant authority that had been acknowledged in the king, by the last estates; that he might not only govern according to the laws then subsisting, but he might change them, or add to them, as he thought fit, for the good of the kingdom [o].

“On ne sauroit croire quel immense revenu le roi s'acquitt par le
“moyen des reunions: et combien il appauvroit en meme temps
“la plupart des familles de Suede dont les ancestres et eux memes
“avoient consumé leur biens et leur vies au service de l'etat [p].”

Hereupon the king established and settled a constant military force; and to attach the officers the more to his interest, he not only increased their usual pay, but gave them rank and precedence after the privy counsellors; which was a great mortification to the noblesse. But it was too late to complain; the old Gothic constitution, with their liberties, were lost, and they were now to expect the same tyranny and oppression which they had heretofore practised upon the commons; which, in the following reign, had very near proved the destruction of Sweden; and was the means of establishing the form of government they enjoy at present.

SECT. IV.

The Commonalty of England had, from the beginning, a great Spirit of Freedom, and many Circumstances of Advantage, as in other Respects, so even as to Trade.

AFTER having thus considered the changes that have happened in the constitutions of other countries, mankind will probably wonder how this kingdom, which, like all the rest, had

[o] Hist. Sweden, liv. ii. p. 168.

[p] Ibid. p. 173.

a dis-

a distinction between nobility and commonalty, should have avoided those animosities between them, which have proved the destruction of all the Gothic constitutions. This ought to be, in the first place, ascribed to the good providence of God, who doth whatsoever he pleases in all the kingdoms of the earth. But as this providence acts by second causes, it may be worth our while to enquire what they were that had any efficiency in this affair; and I shall, with great freedom, proceed to lay open my thoughts on this point.

AND herein I must, in the first place, observe, that the commons of England have, from the most early times, had more freedom and wealth, and consequently more interest in the government, than the commonalty, or third estate, in any other of the countries we have mentioned. For, from the first institution of the Saxon government, the Saxon ceorles, *i. e.* those of the lower rank of people, who were employed in husbandry, were by law secured, in their own persons and in those of their wives, from injuries and affronts. There were penalties, in case any one debauched the wife of a ceorle, or used her otherwise uncivilly [7]. They could not be imprisoned for any cause but for felony and breach of the peace; and then only for want of bail. There were even penalties appointed for binding or beating, or, in other lesser instances, insulting such a one [r].

EVEN the pocillatrix, or maid servant, of the ceorle was not to be debauched without punishment on him that did it [s]. The penalty for debauching her was half as much as for debauching an earl's pocillatrix. Nor was there to be any breach of the peace in the house of a ceorle. The penalty for making it was, by the fifteenth law of Ethelbert, half as much as for the like offence against an earl. By the laws of Ina, Wilk. 16, the penalty for fighting in a ceorle's house was half as much as in an earl's; though the compensation to a ceorle indeed was but a tenth part as much as in the case of an earl. The quantity of rent which they were to pay for their lands, which they farmed, was also ascertained, by

[7] LL. Alfred, 11. edit. Wilkins, p. 37.

[r] Ibid. p. 42.

[s] Leg. Athelf. 16. Wilk. p. 32.

the seventieth law of Ina. And if they paid their rents duly, they could not be turned out of their farms [r].

THE lower freeholders or freemen were bound, indeed, to be security for each other, in their several tythings; and some of them were commendatitii, or under the protection of earls or other great men: but these engagements were owing merely to the unsettled condition of those times, when there was hardly any security to be had unless by force. They did not abate of their freedom in point of law. A ceorle, or freeholder, might be as free as the greatest thane: nay he might come to be a thane himself, if he could but get wealth enough. By a law made in the reign of Athelstan, it was provided, that "*si villanus excrevisset ut haberet plenarie quinque hydas terræ suæ propriæ, ecclesiâ, et coquinam, tympanarium, et januam, et sedem et sunder notam in aula regis, deinceps thani lege dignus sit [u].*" The same law says, that if a thane increased proportionably, he might come to be an earl. "*Iuste etiam nos sapientes diximus, quod Dei providentiâ servus fit thanus, et colonus fit comes.*"

THE freeholders, in their county courts, generally chose their sheriffs and coroners [w]. And the inhabitants of burghs and cities were upon still a more advantageous foot than the ceorles. For, in those turbulent times, all public sales were, by law, to be made in those walled or privileged places, in order to prevent frauds, and the sale of stolen goods. "*Grantebrudge et Norwich et Thetforthe et Gippiswicke tantæ libertatis et dignitatis essent, ut si quis ibi terram compararet, vadibus non indigeret [x]. Nullum mercatum nec forum sit, nisi in civitatibus regni et burgis clausis.*" LL. Will. Conq. Wilk. 217. which was agreeable to the twelfth and thirteenth laws of Athelstan, Wilkins, p. 58, 59. Hence all or most of the trade that was then moving, was carried on by the inhabitants of those places.

[r] Leg. 33. Will. Conq. edit. Wilkins.

[u] Wilkins, p. 70, 71.

[w] See Lord Coke's Comment on 1st of Westminster, 2d Inst. p. 175. and law of Edw. Confess. Wilkins, 205.

[x] Hist. Eliens. 479.

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AND the trade of England, in those times, was not quite so inconsiderable as some writers have represented it [y]. On the contrary, it appears, by several good proofs, that there was trade sufficient to enrich, and make distinguished, the cities that had it. So long ago as the times of the Romans, Tacitus takes notice that Londinium was not indeed “*cognomento coloniae insignis; sed*” “*copia negotiatorum et commeatum maxime celebre.*” A like account is given, by William of Malmesbury, of the city of Exeter, in somewhat later times. Offa had some intercourse with Charlemain, in favour of the Saxon merchants: “*non enim mediocriter*” “*offensus idem Carolus, mercatorum et peregrinorum, quos ad*” “*Offam noverat pertinere, commeantium pacem et transitum per-*” “*turbabat [z].*” Carolus, in answer to Offa’s letter, says “*Nego-*” “*tiores quoque volumus ut ex mandato nostro patrocinium*” “*habeant in regno nostro legitime.*”

ALFRED is said to have much encouraged foreign trade, by building ships, and lending them to merchants for that purpose: and that some, in his time, traded to very remote parts of the globe, and brought things from thence unknown to England [a]. And one great proof of the degree of trade in this nation, at that time, is, the wealth it had then, in comparison of its neighbours, and the opulence of some of its particular trading towns. The author of *Gest. Gul. Conq.* apud Duchesne, p. 210, speaking of the Conqueror’s returning the first time to Normandy, says “*attulit*” “*quantum ex ditioe trium Galliarum vix colligeretur argentum*” “*atque aurum: chari metalli abundantia multipliciter Gallias*” “*terra illa (i. e. Anglia) vincit.*”

THE city of London was so considerable, in the Danish times, as to pay 11,000 *l.* as their proportion of 70,000 *l.* imposed as a tax on the whole nation. Its citizens, and those of other principal cities, were antiently called Barons. In a charter of Henry I (in Brady of Burghs in Append.) the citizens of London, are called Barons. And Matt. Paris, speaking of the citizens of London, says “*cives, quos propter*” “*civitatis dignitatem et civium antiquam libertatem, Barones sole-*” “*mus appellare [b].*” And from Fitz-Stephens, who wrote in

[y] Temp. Misc. part ii. p. 103.

[a] Spelm. Life of Alfred, lib. ii. p. 28.

[z] Vit. Offæ ad fin. M. Paris, p. 20.

[b] Matt. Paris, A. D. 1253.

Henry the Second's time, it appears, that it was then able to furnish 20,000 horse and 60,000 foot. From Spelman's Gloss. in voc. *HUSTINGS*, it appears that, in the Saxon times, London and several other cities held pleas: *Hustings* signifies the house of pleas. And from the charter of Wallingford (in Append. to Brady of Burghs) it appears that they antiently chose some of their own officers. By LL. Edw. Confess. cap. 35. "*aldermanus in civitatibus, &c. eandem dignitatem et potestatem et modum qualem habent præpositi hundredorum et wapentachiorum.*" They had *burgemotes* at certain times, in which their affairs were transacted by their own consent and appointment.

SOME of them, as Exeter and others, had good quantities of land in their public capacities. "*Burgenfes Exoniæ urbes habent extra civitatem terram xii carucat. Quæ nullam consuetudinem reddunt nisi ad ipsam civitatem [c].*" The *burgesses* of Canterbury had forty-five houses, without the city, of which they had the rent and custom: they had also of the king thirty-three acres of meadow land towards the maintenance of their guild [d]. There was so much regard had to these trading cities, that if a slave, in the Saxon times, had continued a year and a day in one of them, and was received into their guild, he was thereby free [e]. But Brady, of burghs, writes as if this privilege was not before Henry the Second's time; but I am apt to be of Spelman's opinion, that it was in the Saxon times. And, by the law of those times, if a merchant so thrived as that he had twice passed over the great sea upon his own account, he was upon the same foot with a thane: which seems to have given rise to a custom in the city of London, that those merchants who have been in foreign countries should wear swords, and others not.

ALL these circumstances of advantage were accompanied with a very high and free spirit, in our lower and middling kind of people, beyond those of other countries; as will appear by several instances. The Chron. of Joan. Wallingford, edit. Oxon. 1694, observes, p. 549, that the people of England, before the time of

[c] Brady, of Burghs, p. 5.

[d] Ibid. p. 10.

[e] Spelman's Gloss. in voc. *THEAM*.

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Canute, "tempore suorum regum in omni honore et libertate extiterat." Accordingly, when they were much oppressed, they would not bear it. When Hardecanute sent two of his servants to gather an illegal tax at Worcester (says Will. Malmfbury), they not only refused to pay it, but killed the collectors. And Earl Tofti, in Edward the Confessor's time, having born hard upon the Northumbrians, they expelled him their country; and when his brother, Earl Harold, went with a body of troops to suppress the insurrection, they met him in arms, and sent him a message, that they were willing to obey any earl who should govern them gently: but that otherwise, "*se homines libere natos, libere educatos, nullius ducis ferociam pati posse: a majoribus didicisse aut libertatem aut mortem* [*f*]."

THE Kentish men, in the time of William the Conqueror, say that they were born freemen: that the name of bondage was never heard of among them. Their leaders therefore exhorted them manfully to fight for the laws and liberties of their country; chusing rather to lose an unhappy life by fighting valiantly for them in the field [*g*].

IT is not certainly known what share the commons had in the legislature, nor by whom it was managed; but there are sufficient grounds to believe they had some share. 1st, Because the Northern nations, from among whom the Saxons came into England, were used to have a share in the legislature at home; which it is not probable their colonies should lose, by their voluntary expeditions abroad. Indeed, we are told they actually retained it in most cases: as that of the Lombards with whom the Saxons were mixed. 2^{dly}, Because of the great freedom which our ancestors the Saxons enjoyed here; even the lower sort of the people. 3^{dly}, Because this may be deduced from several of the antient writings of those times: particularly from the address to Athelstan, the *Judicia Londini*, and some antient charters. Some of these last are probably genuine; yet even supposing them to be false, they must have been forged *ad veritatem imitandam*: and

[*f*] Will. Malmfbury de Gest. Angl. lib. ii. p. 83.

[*g*] Prynne's Plea for the Lords, p. 105.

so soon after the Conquest, it must have been known who were concerned in the legislature.

Now from all these evidences together, I think it clear that the commons, as distinguished from the greater barons, had a share of the legislature: and it is most probable that it was vested in the thanes of so much land; in the sheriffs and heretooks, chosen by the freeholders in the counties; and in the town gereeves, or other officers there, chosen by the burghers. These being parties to the legislature, and chosen thereto by the people, were therefore always attentive to defend their liberties, and prevent any encroachment upon them; a circumstance, which accounts for the high spirit in the people of those times. At the Norman Conquest indeed this state of things was very much changed: the Conqueror introduced the burden of tenures upon the nobility, and bore yet much harder upon the commons, freeholders, citizens, and burgeses. He took from them the choice of the sheriffs, heretooks, coroners, and other officers, into his own hands; he much increased the fee-farms of their towns, &c.

THESE hardships, for a time, stunned the spirit of liberty in the bulk of the nation; but it was not long before it recovered and began to exert itself. As soon as Henry the First's disputed title gave them an opportunity, they immediately stood by him, and by that got a charter; and constantly after were ready to side with all those who appeared against the oppression of the crown. In Stephen's time, the Londoners were, at first, willing to receive the empress Maud, because they hoped she would restore Edward the Confessor's laws; but when they found she would not, they turned quick upon her. When Richard the First's chancellor acted oppressively, they were ready to join with Earl John in deposing him; and when that prince himself, after he came to the throne, acted oppressively, they were as ready to join with the first motions of the barons against him: they received him into London; and such was the general spirit of the nation, that the king had not above seven or eight horsemen left with him, while the barons had a most numerous army. Whatever resolution King John expressed not to grant these liberties they demanded, they were still
more

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more resolute to insist upon them; and to carry their point through. Accordingly they gained such a charter, as was never granted at once to any nation in Europe, in those, or in modern times: such a one as secured them against all the grievances they complained of. And in doing it, we see the nobility and the commonalty acted so much in concert, that there was no less provision made for the privileges of citizens and burgessees, than for the nobility and gentry [b].

S E C T. V.

They were also upon better Terms of Agreement with the Nobility, than most other Nations were; and the Power which the Nobility lost fell in a great Measure to them.

AND this concert, between the nobility and the burgessees and freeholders, continued down all along through the succeeding reigns: indeed there was a clause in the great charter which helped greatly to preserve and even increase it. This was the provision that the greater barons should have their several distinct writs to parliament; whereas the lesser barons were only to be summoned by a general summons. The consequence of this was, that the lesser barons, by degrees, discontinued their attendance in parliament; and, from being of the body of the nobility, they naturally fell into the body of the commonalty; by which they both augmented the weight and dignity of that body, and engaged the nobility to have much greater regard to them, and the conservation of their liberties, than probably they might otherwise have had: for we see all along that there was a proportionable regard had to the privileges and happiness of the commons, as well as to the noblesse. Some persons have thought, that before Henry the Seventh's time, the commons in parliament were quite governed by the house of lords; but the contrary is very evident from many instances.

[b] See Magna Charta.

So that, whereas in France and Spain, &c. the commons were of very little weight and esteem, because they consisted only of peasants, roturiers, and bourgeois, ours in England, being not only of high spirit originally, but being increased, by having great numbers of the antient gentry fall into them, and make one body, came to have great weight in parliament, and in the balance of the constitution. The nobility neither could, nor were so much disposed to oppress them, as they would otherwise have been. They were, on the contrary, willing to have their assistance at all times against the crown; and the commons, on their side, were at all times willing to give it, and to act heartily in concert with the nobility in favour of liberty.

THIS was done by the Londoners, in Henry the Third's time; who assisted Montfort with a body of troops at the battle of Lewes: the Cinque ports engaged on the same side, and continued in it after the battle of Evesham. And even those who sided with the crown acted so much upon principles of liberty, and had so much regard to the other party, that after Henry III had prevailed, and quite defeated and ruined the other party, by the battle of Evesham, yet these royalists interposed and would not suffer him to be absolute, or quite trample upon the other party. They prevailed upon him to grant most of them their estates again, upon a reasonable composition, and to return the city of London its liberties, upon a reasonable fine.

THE earl of Gloucester, who had been in arms for the king, and been a chief means of defeating Montfort, was so solicitous about gaining a reasonable composition for the disinherited, that he took arms again against the king, and possessed himself of London, till the terms were so well settled, that the commons and body of the nation were nearly upon as good a foot of liberty as they were before the war. In like manner, when Edward I had imposed taxes by his own authority, the two great earls of Norfolk and Suffolk went to the Exchequer, and opposed the levying of them. The historians tell us, that the citizens of London came with them; whom they had gained to stand with them for the recovery of their liberties: and when they came to London armed soon

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after, the Londoners received them, and let them place guards at their gates.

WHEN Edward the Second's queen landed with but a small body of men, and declared she designed to deliver the nation from the oppressions of the king's favorites, the people flocked to her standard in great numbers. Again, when Richard II had planned designs against the liberties of the kingdom, and sent to the sheriffs to draw in the people against the confederate lords, he had for answer, that the people would not serve against those patriot lords. And how great this general spirit was in favour of those who endeavoured to support the liberties of the nation, appears from the alacrity with which all ranks of people ran to the standard of Henry IV, who, though he landed only with a small body of men, had, in as short a time as they could assemble together, an army of above 60,000 men.

AND yet, during all those times that the generality of the commons of the nation were so ready to fall in with the measures of the great lords, against the crown, in favour of the common liberty, they were not in other respects so much under their influence as some persons have represented them. On the contrary, their representatives often opposed the house of lords in points of importance. There was a petition to Edward II, in parliament, of all the bishops, prelates, counts, barons, and others, requesting, that they might improve their manors, by waste grounds out of the forests. To which the king's council answered, that this could not be done without a new law, to which the commonalty of the land will never assent [*i*]. In 13 Edward III, the lords granted the tenth of their grain and wool; but the commons would grant no more than 2500 sacks, and those upon condition [*k*]. In 17 Edward III, the commons, complaining of the abuses of the papal provisions, declare that they could not, nor would any longer endure them. They desire that a letter may be wrote to the pope, with complaints against them, and that if any peers or great men would not seal such a letter, they (the commons) would not hold them well-wishers to the king's profit or theirs [*l*].

[*i*] See Rily's Plac. Parl. p. 6.

[*k*] Cott. Abridg. p. 19.

[*l*] Ibid. p. 41.

IN 6 Richard II. Rot. Parl. N^o. 52. the commons made a protestation to the king, in which they say, that a pretended statute made against the Lollards, by the king and lords, was never assented to by the commons; and therefore pray that it may be annulled: for it was not their intent to be justified; nor to oblige themselves or their successors to the prelates, more than their ancestors had been in times past. By 14 Richard II. cap. 12. and again by 16 Richard II. cap. 2. no liege persons of the king's subjects shall be compelled to answer for their freehold before any lord or lady's council. In 9 Henry IV. Rot. Parl. N^o. 22. the lords sent for certain of the commons, and told them what subsidy they would give the king, and wished them to tell their companions, and advise them to agree thereto. Unto which the commons took great exception, and complained thereof to his majesty [m]. And in 11 Henry IV, the king, in parliament, told the commons that sith as well the lords as the commons were come to unity, he doubted not that they, the said commons, would not speak any unfitting words, or attempt any thing to the contrary [n].

IN 1552, in the reign of Henry VIII, the commons rejected a bill, sent down from the house of lords, for reforming some abuses, in regard to defeating the title of the crown and lords to wardships: the king was very earnest for it, but the commons would not pass it [o]. From these passages it will appear, what a spirit of liberty, and how much weight in the balance of the constitution, the commons had, even before the civil wars between the houses of York and Lancaster.

IN the course of those wars, the power of the nobility, who, till then, by means of their large estates, dependencies, and numbers, had been very formidable, was very much weakened, by the extinction or ruin of many of the chief families. The authors of the Royal Treasury say, p. 164, that at Edward the Fourth's first coming to the crown, above 140 considerable persons were attainted by parliament. The nobility were still much more weakened, in the reign of Henry VII, by the acts of parliament then

[m] Cott. Abridg. p. 465.
Refor. vol. i. p. 117.

[n] Ibid. p. 470.

[o] Burnet's Hist.

made,

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made, giving liberty to them, to alienate so much of the estates of those that remained. In the mean time, the power of the commons was increasing, so that in Henry the Eighth's time, they were grown, in some measure, able to act that part of supporting the liberties of the nation against the attempts of the crown; which the nobility had hitherto done, but were hardly any longer capable of doing effectually.

THE reign of Henry VIII, was indeed the greatest crisis, with regard to the preservation of our liberties, that ever happened to this nation. That prince had very great advantages towards making the crown absolute. Lord Herbert observes, that by the civil wars, many breaches were made to let in the authority of the crown: Henry VII had gained the establishment of the Star-chamber court, with powers not a little arbitrary, which might be made use of, both against the nobility and against the people.

By the advantage of the reformation, and by the competition of the protestants and papists, for the countenance and protection of the crown, Henry VIII had all the abbey lands thrown, without any condition, into his hands. Those lands, together with what they got from hospitals, chantries, bishoprics, deans and chapters, &c. were certainly not less, if they were not rather more, than a fourth part of all the lands in the kingdom. By the act of submission, &c. he brought the clergy entirely under his power; and the parliament went so far as to make an act of parliament, that his proclamations, not repugnant to any statutes in force, should be received and obeyed as laws. In these circumstances, a prince who had been a deep politician, of great foresight, and desirous of making his successors in the monarchy absolute, as well as himself, might probably have laid such foundations for doing it, as could hardly have failed. For, first, a person of his character, after he had brought the clergy into an entire dependance upon the crown, would probably have then let them continue to enjoy a great part of their lands, which would have been a constant fund of revenue to himself and his successors: and, at the same time, would have continued to the regular prelates, abbots, and priors, who held by barony, their seats in parliament; which would have

been, not only the securing to himself a number of votes there, but also the influence of the clergy in their counties, which would have been very great upon the spirits of the people, in favour of the crown. Or, if he had not done this, he would, at least, have favoured the lower clergy, in the desire they had of being admitted to sit by their proctors in convocation, as members of the house of commons, for which pretension they had some considerable reasons to offer, drawn from the antient Saxon constitution, and even from authorities of later date.

INGULPHUS saith, that in “ festo nativitatis beatæ Mariæ, cum “ universi magnates regni per regium edictum summoniti, tam “ archiepiscopi, episcopi, abbates, clerici, quam totius regni pro- “ ceres et optimates London, convenerunt ad tractandum de negotiis “ publicis totius regni, &c.” And in the Rot. Parl. 21 Richard II. N^o. 10. there was an instrument of procuration made in parliament, by the archbishops and clergy of both provinces, to Sir Thomas Percy : from whence it appears, beyond all doubt, that the lower clergy had a right to be and act in parliament, as well as by the bishops. And, from what follows, it appears, that this procuratorial instrument must have been granted to Sir Thomas Percy by the lower clergy, as well as by the bishops. For when, soon after, at the end of this parliament, an oath was taken by all the states, to maintain perpetually the statutes &c. passed in this parliament, the bishops, abbots, and priors, took this oath first ; then, the temporal lords ; then, the knights of the shires, &c. then Sir Thomas Percy took this oath for the whole clergy, who must therefore have been the body of the lower clergy, because the bishops, &c. had sworn before [p].

OR if Henry VIII had resolved not to take any course so much in favour of the clergy, he should, at least, have kept the greatest part of the abbey and clergy lands in the crown ; or if he disposed of any of them to lay hands, it should have been done upon not very long leases, with considerable reserved rents, and subject to tenures in capite, and dispersed them into as many families as he

[p] See Brady's Richard II. p. 400.

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could; by which means he would have had most of the estates of the kingdom in subjection to him.

BUT farther, if that prince, at the same time that he encouraged trade in some measure, had also made laws, that should have prevented trade from putting its owners upon too high a foot; and have procured the aids, for the public service, to have been raised from such taxes as would have affected the trading part of the community, at least as much as the gentry and clergy; whereby the latter would be taxed upon a very favourable foot: I say, had Henry VIII and his successors pursued such measures for some length of time, the crown might have damped, and at length, by degrees, quite broke and subdued that strong spirit of liberty, which, partly from the climate, and partly from long custom, was prevalent in the mass of the people.

BUT, very happily for our nation, this prince, who was much governed by his passions, especially his vanity and self sufficiency, imagined that his successors might govern as he had done; but never took any measures that might enable them to do it. On the contrary, he took measures, which in the natural course of things must prevent them from doing it. He dissipated the church lands among his courtiers, among whom several were commoners, by absolute gift, without reserving any considerable quit-rents or payments to the crown. He gave way to the clergy's being brought upon a very low foot, even with those lands that were left to them; because he caused several laws to be made to their disadvantage; and, it is most probable, he was the means of hindering the inferior clergy from being received into the house of commons, as a part of the legislature. At the same time, trade beginning to encrease very much, after the discovery of both the Indies, and the wealth arising from thence coming chiefly among the commons; and the estates of the nobility having been made alienable, many of their estates, and those of the church, came, in no long time, into the hands of the commons, whose power and dependencies, as well as their spirits, were thereby much exalted.

SECT.

S E C T. VI.

After Henry the Eighth's Reign, their Freedom was placed on a secure Bottom.

UPON the death of Henry VIII, the duke of Somerset, protector in the reign of Edward VI, took the party of the people, against the noblesse, and gave way to repealing the act which gave the force of law to the proclamations of the crown, and to the making some others, not very favourable to the prerogative. And in order to have advantage of some more of the church lands, he and some other ministers of that and the next reign, a good deal encouraged the presbyterian party, in ecclesiastical matters. Which party, like its authors abroad, were most of them of antimonarchical spirit, and contributed to diffuse that, or at least a spirit of very much liberty, as much as they could through the nation. And they succeeded so much, that Queen Elizabeth and her council were, at length, very sensible of the too great increase of this spirit among the people, as well as that by the over weight of property acquired by them, the balance was turning, or turned, on their side against the lords, and even the crown when joined with them. She knew that this would some time or other endanger the crown: but it was too late to oppose it; and, therefore, tho' that wise queen sometimes spoke and governed with the spirit of her father, yet she was at other times obliged to make court to her people. Harrington observes, that her reign was a series of love tricks, between her and the people; and Mr. Rapin says, she was trop comedienne.

JAMES I knew as well as she where the weakness of the constitution lay, or how much the power of the crown was declined: indeed the house of commons made him feel it: and, in order to prop it up, he endeavoured to raise the power of the clergy, as a support to the crown; and to infuse principles of reverence to it, from the sacredness of hereditary right, the doctrine of passive obedience, and the like. But he undertook this work too late; besides

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besides he did not manage it with sufficient address to carry it so far as it might otherwise have gone. The consequence of which was found very sensibly, and produced terrible effects, in the reign of Charles I. That unhappy prince, filled with lofty notions about the original inherent rights of the crown, did not consider that rights, if they had been such, will do nothing without power to support them, and that the effective power was vastly against the crown; because the mass of the people, in whom was lodged the far greatest part of the wealth and strength of the nation, would be against all such pretensions to absolute power. Indeed it was found, that the bulk of the nobility and gentry were almost as much inclined to oppose those pretensions to arbitrary power as the people.

It is true, many or most of the nobility, upon the crown's having given up those pretensions, did take its part, before the beginning of the war in 1641. But the puritan and republican spirit that had been raised, could not be laid again; and was of itself sufficient, as it proved, to subvert the monarchy. After the miserable confusions of those times had made people weary, and produced the restoration, Charles II thought it was a time, when the nation were warmly zealous for monarchy, to try to make himself absolute, and some of his ministers were for it: but those wise and great men, the earls of Clarendon and Southampton, saw it would not do, and so diverted him from trying it, in the beginning of his reign. They even caused him to give up the tenures by knights service, which was indeed as much a weakening to the crown, as it was an advantage to the gentry of England.

JAMES II, however, could not forbear trying the same thing, and upon the same principles, that his father had done: but he found too that nature would not rebel against principle, in the most zealous asserters of passive obedience, and that the bulk of the nation both thought that their rights were just, as well as valuable, and would defend them accordingly. The ill-judging zeal and hauteur of this king, in pushing things to extremity, brought on the revolution: which being happily and soon, and without bloodshed, effected, put the constitution upon the foot it is.

is at present; and though, as I have already observed, it may not be quite perfect, yet I will venture to say the condition of the nation is, taking all things together, as happy as any nation either now is, or perhaps ever was. For, by an act of 12 and 13 William III, intituled, An act for the limitation of the crown, sect. 14. the laws are declared to be the birth-right of the people of this realm, and all the kings, who shall ascend the throne of this realm, ought to administer the government of the same, according to the said laws; and all their officers and ministers ought to serve them respectively according to the same.

MANY of the republics of antiquity, by giving too much to the mass of the people, were almost all very much troubled with seditions; and Lacedæmon and those others that were not, were, in order to prevent them, obliged to deny themselves many of the conveniencies of life. If any modern commonwealth, as Venice, Holland, or Switzerland, seem to have more appearance of liberty, they have not so in reality. The government is more severe and more strict upon private subjects. Sweden did lately, indeed, recover in some respects rather more liberty than we; but at present the aristocratical form of government prevails in that kingdom, of all governments the most oppressive to the commonalty of people: besides Sweden was always much less free than us in point of religion; and it has a much less happy climate, and less plenty of all things conducive to the ease and pleasure of life. So that, taking all things together, I say we are, at present, as happy as any nation can reasonably expect to be. The only consideration that can fall in to disquiet us, is, whether we are likely to enjoy this happiness? *i. e.* whether this establishment, as to its principal parts, is likely to be permanent, or not? for if it be not, this circumstance must be an abatement even to our present happiness. Now as to this point, one ought not perhaps to pretend to judge what will certainly come to pass; but as there may be some means of making a probable judgment, I shall endeavour, in the following sheets to throw all the light I can on this matter.

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TRACT IV.

Of the Antiquities of the Commons in Parliament.

AS an enquiry into the antient state of the commons in parliament will tend to shew what the original constitution of this nation was, I shall endeavour, by setting forth my own observations, to throw some new light upon this matter. Now here it may be first observed, as a general consideration of some weight, that the upper part of a nation, where they have the authority of government solely in their hands, will always be for keeping the low people under, and not be for granting them any great privileges: we have seen that this has been the case in several nations.

SINCE therefore it appears that the people of the lower ranks, among the Saxons, had actually great privileges, and a very free spirit, it is natural to suppose that they must have had some part in the choice of their legislators. It is of farther weight in this case, that, as I observed above, the Northern nations, from among whom our Saxon ancestors came, had a third and even a fourth estate in their legislatures. The burghers and peasants made originally a part of their great councils, as well as the nobility and clergy: and their colonies having been used to this privilege at home, it is not likely they should be willing to lose it in those public constitutions of government which they made in their foreign expeditions. In fact, it appears that some of the Northern colonies, that went abroad, did not lose this privilege. Otho Frisingens. de Gest. Imp. Fred. cap. 13. p. 241. says of the Lombards, “*tantopere libertatem affectant, ut, potestatis insolentiam fugiendo, consulum potius quam imperantium reguntur arbitrio: cumque tres inter eos ordines, i. e. capitaneorum, valvasorum, et plebis esse noscuntur, ad reprimendam superbiam, non de uno sed de singulis prædicti consules eligantur.*” And the same author observes, p. 241, “*igitur rege (i. e. imper. Freder.) apud roncalias quinque, ut aiunt, dies sedente, et ex principum ac de universis pene civitatibus consulum seu majorum conventu*

“curiam celebrante, diversa hinc inde diversis in queremoniis
“emerfere negotia.”

THE curia here mentioned is the same as a general assembly, or placitum, or mallum, which was often called curia, from whence the Spanish cortes had its name. And we see the consules, who were members of it, were chosen by the lower people, among the Lombards, as well as by the chieftains. Now that these Lombards came from the same Northern countries with our Saxon ancestors, and had even many Saxons mixed with them, we are informed by very good authority. Paulus Diaconus, who was himself a Lombard, tells us, that the Saxons were mixed with the Lombards in their expedition into Italy [q]. And that the custom was the same in Germany, appears from Radevicus, lib. ii. de Gest. Frederici. “Confluunt ex omnibus regni partibus cum
“magnâ frequentia archiepiscopi multique alii ecclesiastici viri,
“duces, marchiones, comites, proceres, consules, et civitatum
“judices. Idem expresse dicit Guntherus: Prælati, proceres, mis-
“sique potentibus urbis.” The same thing appears to have been customary in Germany in yet later times. Wippo de vita Conradi Salici, edit. Francof. ad Moen. A. D. 1654, in his chapter intitled, de Electione Regis, describes a great council, or confluence of people near Worms, at their going upon the election, p. 426. “Confedere principes, populus frequentissimus astabat. Archi-
“episcopus Moguntinus rogatus a populo quid sibi videretur,
“elegit majoris ætatis chunonem, in dominum et regem. Hanc
“sententiam cæteri archiepiscopi et reliqui sacrorum ordinum viri
“indubitanter sequebantur. Junior chuno illum elegit. Tunc
“singuli de singulis regnis eadem verba electionis sæpiissime repe-
“tebant. Fit clamor populi, omnes unanimiter in regis electione
“principibus consentiebant.” This was in A. D. 1024, and the same author says, that A. D. 1028, “Imperator Conradus filium
“suum Henricum, principibus regni, cum tota multitudine id
“probantibus in regalem apicem apud Aquisgranum sublimari
“fecit.” The case was the same in the lower part of Germany

[q] Sigon. de Regn. Ital. p. 6.

or Belgium. “*Penes utrumque ordinem nobilium et oppidanæ plebis reipublicæ cura antiquitus fuit [r].*”

Now since, from these passages, it appears, that the Northern people, and particularly the Saxons, did retain in their foreign settlements, the same privilege which they had at home, of having a share in the great councils or legislature of their countries, it is highly probable that our Saxon ancestors did the same here in England, that their countrymen did in Italy and Germany. And for the truth of this indeed, we have considerable evidence, from several antient writings now extant, which give an account of the state of those times. Most of them are either relations of councils, or extracts from charters, said to have been in those times. With regard to which, however, before I produce them, I would not promise that all of them are genuine, that is to say, made at the very time, and by those persons to whom they are ascribed. There is reason to think that some of them might be forged, by the monks, in the time of William the Conqueror, or soon afterwards, when their titles to their lands were contested. But, even admitting this to be the case, they may nevertheless be of considerable weight towards proving the point for which I intend them: because it is evident that, if any of them were forged, they were forged not long after the Conquest: and learned men at that time, as they must have known what was the state of things, as to the legislature in the Saxon times, so they would certainly have taken care to make their charters represent things agreeable to fact. Besides had they not done so, this would have been a certain sign to the king and the great men, who must have known how the legislature then was, that these charters, which did not agree with it, were false: on that account therefore they may serve our purpose, whether they be really genuine or not.

In Spelman's councils [s], it is said, that, about the year 712, King Ina assembled a great council, wherein several things “*ad concordiam publicam promovendam*” were done “*per commune concilium et assensum omnium episcoporum, et principum*”

[r] Grot. Annal. lib. i. p. 4.

[s] Tom. i. p. 219.

“procerum, comitum, et omnium sapientum, seniorum, et populo-
 “rum totius regni.” And agreeably to this, Bede, in his Eccle-
 siastical History, lib. i. tells us, that the grand league and union
 between the Britons, Saxons, and Picts, was concluded and con-
 firmed, “per commune concilium et assensum omnium episcopo-
 “rum, procerum, comitum, et omnium sapientum, seniorum, et
 “populorum, et per præceptum regis Inæ.”

In the account of the council of Calchuth given to pope Adrian
 I, and related in the Magdeburg Centuriators, cent. viii. chap. 9.
 p. 575. it is said, “Hæc decreta, beatissime, in concilio publico
 “coram rege Aelfwaldo, et archiepiscopo Eanbaldo, et omnibus
 “episcopis, abbatibus, regionis, seu senatoribus et ducibus, et
 “populo terræ proposuimus; et illi, ut superius fati sumus, cum
 “omni devotione mentis juxta possibilitatem virium suarum, adju-
 “vante supernâ clementiâ, se in omnibus custodire decreverunt.”
 In the gift of the tithes to the clergy, by Ethelwolp, at Win-
 chester, A. D. 855, it is said to have been made “præsentibus
 “archiepiscopis et episcopis Angliæ universis; nec non Beorredo
 “rege Merciæ, et Edmundo East-Anglorum rege, abbatum, abba-
 “tissarum, ducum, comitum, procerumque totius terræ, aliorumque
 “fidelium infinita multitudo; qui omnes regium chirographum
 “laudaverunt, dignitates vero nomina subscripserunt [1].” A char-
 ter of Hardecanute is said to have passed, “cum assensu, laude et
 “consilio suorum archiepiscoporum, abbatum, monachorum, cleri-
 “corum, et regni sui devotorum, procerum et cæterorum minoris
 “ordinis gregariorum militum.”

In these above cited charters, and others, we see, that though the
 terms used are seldom the same, yet there are almost always some
 expressions that represent the commons or lower sort of people, as
 well as the nobility, to have assisted at those great councils or
 parliaments at which the charters were passed; and to have given
 their consent to them, if not by their subscriptions, yet at least by
 their acclamations; which I have before observed to have been
 the way practised by the people of Germany. Now such a con-

[1] Ingulph. Hist. p. 863.

currence of sentiments in a number of writers, who certainly lived not long after the Conquest, and their concurrence in such a point, as who were members of the Saxon great councils, which they could not but have known at that time, and durst not have misrepresented; such a concurrence, I think, deserves to be esteemed a proof of considerable weight, that the commons were then usually present, and some way parties to those national assemblies.

BUT besides these charters, there are extant one or two pieces which appear to belong to the Saxon times, and which indeed have so great marks of genuineness, that I cannot but lay a good deal of stress upon them. One of them is a letter or address sent from the council of Feversham, held about A. D. 930, to King Athelstan their sovereign. It is in the following words, as we have them in the Chronicle of Brompton, p. 850. “AD ATHELSTANUM REGEM. Karissime, Episcopi tui de Kent, et omnis Kentweire, Theyni, comites, et villani, tibi domino dilectissimo suo gratias agunt quod nobis de pace nostra præcipere voluisti, et de commodo nostro perquirere et consulere, quia magnum opus est inde nobis divitibus et egenis. Et hoc incepimus quantâ diligentiam potuimus consilio horum sapientum quos ad nos misisti: unde, charissime domine, primum est de nostrâ decimâ, ad quam valde cupidi sumus et voluntarii, et tibi supplices gratias agimus admonitionis tuæ. Secundum est de pace nostrâ quam omnis populus teneri desiderat, sicut apud Greatleyam sapientes tui posuerunt, et sicut etiam nunc dictum est concilio apud Fefresham. Tertium est, quod gratiam omnes misericorditer Hermerum dominum suum de dono quod foris factis hominibus concessisti, hoc est, quod pardonatur omnibus forisfactura de quo cunque furto quod ante concilium de Fefresham factum fuit; eo tenore quo semper deinceps ab omni malo quiescant, et omne latrocinium confiteantur trine ad Augustum. Quartum, ne aliquis recipiat hominem alterius sine licentiâ ipsius cui prius folgerit, nec intra marcum, nec extra; et etiam ne dominus libero homini hiasocam interdicat, si recte custodierit eam. Quintum, qui ex hoc discedat, sit dignus eorum quæ in scripto pacis habentur quod apud Greatleyam institutum est. Sextum, si aliquis

“ homo

“ homo sit adeo dives, vel tantæ parentelæ quod castigari non possit,
 “ vel illud cessare nolit, ut efficias qualiter abstrahatur in aliam
 “ partem regni tui: sicut dictum est in residuis partibus sit alte-
 “ rutrum quod sit, sit comitum, sit villanorum. Septimum est, ut
 “ omnis homo teneat homines suos in fidejussione suâ contra omne
 “ furtum; si tunc sit aliquis qui tot homines habeat quos non suffi-
 “ ciat omnes custodire, præpositum talem præponat sibi singulis
 “ villis qui credibilis ei sit et qui concredat hominibus. Et si
 “ præpositus alicui eorum hominum concredere non audeat, inve-
 “ niat 12 plegeos cognationis suæ qui ei stent in fidejussione. Et
 “ si dominus, vel præpositus, vel aliquis hoc infringat, vel abhinc
 “ exeat, dignus sit eorum quæ apud Greatleyam dicta sunt, nisi
 “ regi magis placeat alia justitia. Octavum, quod omnibus pla-
 “ cuit de scutorum opere sicut dixisti. Precamur, domine, miseri-
 “ cordiam tuam, sit in hoc, sit in alterutrum vel nimis vel minus;
 “ et hoc emendare habeas juxta velle tuum: et nos devotè para-
 “ ti simus ad omnia quæ nobis præcipere velis quæ unquam aliqua-
 “ tenus implere valeamus.”

In this piece, which gives a very natural account of the turbu-
 lent uncivilized state of those times, we see that the regulations
 made for preserving the peace, &c. were made by the consent of
 the villani, as well as of the theyns and comites. They are all
 joined in the address: which never would have been, unless the first
 sort of men, *i. e.* the citizens and burgessees had some share in the
 legislature, as well as the theyns and comites. And this indeed is
 farther confirmed by a collection of ordinances or laws made, not
 long after that time, in the great council of London, held under
 the same King Athelstan, and confirmed by him. The title of
 this collection, which is published in Dr. Wilkins's collection of
 Saxon laws, is, *Judicia Civitatis Londini*. And they begin thus:
 “ Hoc est consilium quod episcopi et præfecti, qui ad curiam Lon-
 “ dinensem pertinebant, edixerunt et juramentis confirmaverunt
 “ in nostris fœderatum sodalitiis tam comites quam coloni.”

This piece consists mostly of regulations made for preserving
 the peace and property of every one against those thieves who then
 much abounded; for preventing their being harboured or protected
 by

by any men of power or wealth; for the discovery, the pursuit, and the punishment of them, when they are taken. These punishments were to be either fines, or, in some cases, death; and in the pursuit of the thieves from one province to another, the several officers of the provinces are ordered to give their assistance to the pursuers, which circumstances plainly shew that they who made these ordinances must have had a share in the legislature, and that they knew they would be authoritative on receiving the king's assent and confirmation; which were actually given to them, as appears by the final clause. Now the ceorliffe, or coloni, would never have been mentioned, as present in this council, and parties to the regulations made in it, unless they had actually been so, and therefore it is reasonable to conclude they were. In one of the Confessor's laws (viz the 8), which speaks of bees, how tithes ought to be paid of them, and of other things, it is said "hæc concessa sunt a rege, baronibus, et populo."

BUT farther, in order to shew the weight which the commons had in public affairs, it is observable, that, in 1017, King Ethelred being dead, the procures which were in London, and the citizens, chose Edmund king. Florence of Worcester, and out of him Hoveden, says "cives Londonienses et pars nobilium, qui eo tempore consistebant Londonia, Clitonem Eadmundum unanimi consensu in regem levavere." Again, in 1040, Harold was chosen king in opposition to Hardicanute, by Earl Leofric, and the mariners of London, and almost all the Thanes north of Thames: so says the Saxon Chronicle. And William of Malmesbury, speaking of Harold's answer to William the Conqueror's claim to the crown, represents Harold to have said, "de regno præsumptuosum fuisse quod absque generali senatus et populi conventu et edicto, alienam illi hæreditatem juraverit." Malmesbury, says Dr. Hody [u], wrote within sixty years after that time, and was well skilled in the history and antiquities of this nation, and so his authority should be of great weight, notwithstanding Dr. Brady despises it.

[u] Convocat. p. 123.

To the abovementioned arguments from antient charters, laws, and historians, may be added another argument drawn from the case of tenants in antient demesne, who have claimed a privilege, from beyond all times of memory, to be free from being taxed to contribute to the wages of knights serving for the counties, in parliament. This appears from a writ in the old Register, fol. 261, which is there put down as a form for drawing all writs of the like kind. “Rex vicecomiti L. Salutem.—Monstraverunt nobis
 “homines et tenentes de manerio de F. quod est de antiquo domi-
 “nico coronæ Angliæ, ut dicitur; quod licet ipsi et eorum ante-
 “cessores tenentes de eodem manerio a tempore quo non extat
 “memoria semper hæctenus quieti esse consueverunt de expensis
 “militum ad parlamenta nostra et progenitorum nostrorum Regum
 “Angliæ pro communitate dicti comitatus venientium, &c.” And that notwithstanding this, the sheriff distrains the said tenants to contribute to the expences of the knights that came to the last parliament, therefore the king commands the sheriff to desist from his distress. This writ was given about the 15th year of Edward II; and there is extant yet a perfecter writ of this kind, of 50 Edward III, in which that king sends a supersedeas to the sheriff, in favour of certain tenants of lands in gavelkind, who claimed that hitherto, “a tempore quo non extat memoria,” they had been, and ought to be free from contributing to the expences of knights of the shire.

THIS time beyond memory, is, in law, such time as was before the reign of Richard I, as may be seen by a petition of the commons to Edward III [w]. Now if King Edward II allowed, as he really did, these claims, by prescription beyond memory, to be exempted from contributing to the wages of knights of the shires, to be good, it follows that this king was then satisfied, that there had been knights of the shires from time beyond memory. For if knights of the shires had begun in any time within memory, that is since the beginning of Richard the First’s reign, then the tenants of antient demesne, could not have had a legal prescription, for time immemorial, for their exemption.

[w] Tyrr. B. P. p. 421. and Coke, on Lyttleton, lib. ii. sect. 170. p. 115.

ANOTHER argument to confirm that the commons were very antiently a part of the legislature, has been drawn from a petition of the burgesſes of St. Albans, to Edward II, in the eighth year of his reign; in which they ſet forth that they, “*sicut cæteri burgesſes regni ad parliamentum regis, per duos comburgenſes ſuos venire debeant, prout totis retroactis temporibus venire conſueverunt, tam tempore domini Edwardi I, nuper regis Angliæ, patris regis, et progenitorum ſuorum,*” as in the time of Edward II, himſelf “*ſemper ante inſtans parliamentum :*” and that the names of ſuch burgesſes were always enrolled in the rolls of chancery. Notwithſtanding which the ſheriff of Hertfordſhire, by the procurement of the abbot of St. Albans, reſuſed “*burgenſes prædictos præmunire, ſeu nomina eorum returnare, prout ad ipſum pertinuit, &c.*” and therefore they pray remedy. The allegation of the petitioners implied or affirmed, that, in all times paſt, as well in Edward the Firſt’s time, as in the time of his progenitors, burgesſes have been wont to come to parliament. Now this was a point of which ſurely the king and his council could never have been ignorant. Is it ſuppoſable that they ſhould not know whether any burgesſes had ſate in parliament in or before King John’s reign or no? who was grandfather to Edward I, and therefore the word progenitors muſt, at leaſt, go as high as that king’s reign. A fact of that public nature and importance, perſons of their public character muſt certainly have been well acquainted with. If therefore they allow it to have been ſo, it muſt needs have been ſo. And they plainly allow it by their answer to the petition. For by directing that the rolls of chancery ſhould be ſearched, they ſufficiently intimate that the names of ſome burgesſes, who antiently came to parliament, might be found, and the only queſtion was, whether the burgesſes of St. Albans were in that number? This argument appears to be concluſive, if we can rely upon the knowledge of Edward II and his council in that point.

BRADY’S answer to this argument, in his answer to Petyt, p. 38, is certainly inſufficient. He ſays, that theſe burgesſes of St. Albans, if they had any claim to be called to parliament, had it as they

were tenants in capite of the king. But First, this does not appear by the words; for "*pro omnibus servitiis faciendis*," which he translates in lieu of all services, may as well signify that they appeared, in parliament, in order to perform all services that might be required of them. They do not found their claims upon being tenants in capite only; and it is certain that many other burghs, which did not hold of the crown in capite, did yet send members to parliament, as Arundel, Bath, Wells, Bodmin, Bridgewater, &c. [x]. Secondly, Brady observes upon the words "*evocatis evocandis si necesse sit*," that the king was the judge when it was necessary to call them. Whereas, *si necesse sit* refers to their being found to have a just claim to it from the rolls of chancery, or not. But, Thirdly, Brady most evidently endeavours to conceal the true stress of the argument: it lies upon this circumstance, that the king and his council, by directing a search into the rolls of chancery, did grant the general allegation of the petition to be true (*viz.*) that "*cæteri burgenses regni totis retroactis temporibus, tam tempore Edw. I, quam progenitorum suorum, venire ad parlamentum consueverunt.*" Whereas if there were never any election of burgesses till 49 Henry III, which was but fifty years before 8 Edward II, sure all the world must have known such a fact, and much more the king and his council: even the sheriff of Hertfordshire, and the abbot of St. Albans, would most certainly have shewed the burgesses claim to be false, if it had been so; but they could not do it.

STILL another argument of the like sort may be drawn from the rolls of the parliament, 2 Henry V. p. 2. N°. 10. in which the commons say "*our soverain lord your humble and true lieges that bee come for the comens of your land bysechin on to your ritz wiffenesse, tha so as hit hath evere be thair libertie and freedom that there should be noo statute, noo law be made of las than they yaf thereto their assent, considering that the comens of your land the which that is, and ever hath bee, a member of your parlement, been as well assenters as petitioners, &c.*"

[x] Tyrr. B. P. p. 415.

It is most plain that the commons here assert that they have ever been a member of parliament; and can we think that they should be mistaken in a point of so much importance to themselves? They had then, before the abbies were dissolved, many evidences to instruct them in this point, which are probably lost since that time. Brady says, parliaments may be mistaken, and gives an instance of one, in Richard the Second's time, that was so about Ireland. But it must also be allowed to be probable, that a parliament should be well advised and instructed about a thing which so much concerned its own antiquity and right, and which it affirmed so solemnly to the king.

I CANNOT forbear to think, therefore, that this adds no small weight to the other arguments I have produced for the antiquity of the commons, as a part of the legislature in parliament. I am not indeed clear, that they were always there as they are at present, represented by knights, citizens, and burgeses. I am inclined to be of opinion, that the cities and burghs appeared there, by their elected magistrates, their aldermen and tuncereves; and the freeholders by their sheriffs, heretocks, and coroners; all whom the freeholders chose: and it is not improbable that, besides these, the thanes or gentlemen, who had a certain estate, perhaps five hides of land held of the king, might also have a right, or be under an obligation, to attend the great councils. For a charter of Henry I, is thus ascribed, "testibus archiepiscopis, episcopis, comitibus, baronibus, vice-comitibus, et optimatibus totius regni Angliæ, apud Westmonasterium quando ego coronatus fui [y]." But however this was, in general it seems to be sufficiently evident, that the commonalty, as well as the nobility, had originally, and during all the Saxon times, some share in the legislature; and that from thence they derived the great privileges, and the free spirit, they are known to have always had, before the Norman Conquest.

BUT at the Conquest, the case was a good deal altered. William I seems to have born hard upon the cities and towns: as those bodies of men do not appear to have been at that time a part

[y] Hody Convoc. p. 185.

of the legislature in Normandy, so it was his interest not to let them continue to be so here, because he could not expect to influence them so well as he might the land-holders. Many or perhaps most of the land estates were by him disposed of to his creatures; or were, by him, at least, subjected to a tenure which gave him a great command over them. But the inhabitants of cities and burghs were not so easy to be brought into, or made constantly to comply with, his measures, and therefore he seems to have born the harder upon them: and this appears very plain from several considerations. From domesday book, we find he even doubled those fee-farms-rents which several cities had paid to the crown in the time of Edward the Confessor. York, for instance, then paid 53*l.* but, after the Conquest, 100*l.* Oxford paid before, to the king, for all customs and payments, 20*l.* per annum and six sextaries of honey; to Earl Algar 10*l.* per annum: but after the Conquest it paid sixty pounds. Wallingford, in King Edward's time, was valued at 30*l.* but, at the time of the survey, it paid 60*l.* besides the farm rents of 80*l.* And the like was the case of Stamford, Nottingham, Ipswich, Norwich, &c. Several of the liberties they enjoyed in the Saxon times were abridged; and they were subject to that ignominious law of *couvre feu*; and lost in all appearance their *jus communæ*.

FOR though, indeed, William the Conqueror gave a short charter to London, by the intercession of its Bishop, by which he declared, that they should be law worthy, as they were in King Edward's days, and their children should inherit their father's goods, and should be protected from violence, yet it is evident, that they were not upon such a foot of liberty as they were before the Conquest. But by degrees the succeeding kings, standing in need of the assistance of the cities and burghs, did by charter grant them divers privileges. Henry I, Henry II, Richard I, and John, did so to London and several other cities and burghs. But still there is no appearance that any of them were called to parliament, by representatives of their own choice, till the time of King John. Before that reign, the parliaments seem to have consisted only of the Bishops and the greater and lesser lay tenants in capite.

capite. For that the lesser of these tenants were summoned, and had a right to be there, as well as the greater, may be fully shewn by many instances. 1st, The Saxon Chronicle, p. 190, informs us, that William the Conqueror used to keep his Christmas at Gloucester, and that at those times, “*præsto apud eum fuerunt*” “*omnes optimates per totam Anglorum terram; archiepiscopus et*” “*dioces. episcopus. abbates et comites, thani et equites.*”

2^{dly}, EADMER, p. 39, speaking of the great council held at Rockingham, in the reign of William Rufus, about the debate between the king and Archbishop Anselm, says, that in the *Placitum apud Rockingeham*, there was *totius regni adunatio*. And that “*miles unus de multitudine prodiens viro astitit flexis coram eo*” “*genibus, dicens: domine pater, rogant te per me supplices filii*” “*tui ne turbetur cor tuum, &c.* *Quæ verba dum pater comi*” “*vultu accepisset, intellexit animum populi in suâ secum senten-*” “*tiâ esse.*”

3^{dly}, IN 1101, Robert duke of Normandy, being about to invade the kingdom, King Henry I, to engage his people more faithfully to his interest, promised them to govern with just and holy laws: “*sed ubi ad sponfionem fidei regis ventum est, totius*” “*regni nobilitas, cum populi numerositate, Anselmum, inter se et*” “*regem, medium fecerunt, quantus ei vice sui, manu in manum*” “*porrectâ, promitteret justis et sanctis legibus se totum regnum,*” “*quoad viveret, in cunctis administraturum [z].*”

4^{thly}, AT the great council at Northampton, under Henry II, against Archbishop Becket; the bishops and earls, and greater barons, are described to have gone unto the king to judge Becket. The bishops desired to be excused from judging him. “*Nec minus,*” says Fitz-Stephens, “*a comitibus et baronibus exigit Rex de archi-*” “*episcopo iudicium. Evocantur quidam ex vice-comitibus et se-*” “*cundæ dignitatis barones, ut addantur eis et essent iudicio.*” This clause shews that the vice-comites, as well as the barones minores, were present at the council, though they had no part in judgment.

5^{thly}, HOVEDEN, fol. 445, mentions some regulations made in Richard the First's time, about the forests, “*per assensum et*

[z] Eadmer, p. 59.

“ consilium archiepiscoporum, episcoporum, abbatum, comitum,
 “ et baronum, et militum totius regni [a].”

THE first step that I can find to have been made towards admitting the representatives of the cities and burghs to parliament, was the legate's sending for the Londoners to the council of Winchester, in the reign of King Stephen, A. D. 1142. They were then looked upon as of such considerable weight, that it was thought of moment to soothe and gain them. In King John's time, the citizens of London, having sided with the barons, and admitted them into the city, their interests were farther taken care of in the great charter, granted by that prince, A. D. 1215, in the 17th year of his reign. That charter, after saying that no scutage or aid should be taken in the kingdom, but by the consent of the common council thereof, except in three cases, and then only a reasonable aid, goes on thus, “ Simili modo fiat de auxiliis de civitate Londonensi: et civitas Londonensis habeat omnes antiquas
 “ libertates et liberas consuetudines suas tam per terras quam per
 “ aquas. Præterea volumus et concedimus quod omnes aliæ civitates, et burghi, et villæ, et barones de quinque portubus, et
 “ omnes portus habeant omnes libertates et omnes liberas consuetudines suas:” then immediately follows, “ et ad habendum
 “ commune concilium regni de auxiliis assidendis (aliter quam in
 “ tribus casibus prædictis) et de scutagiis assidendis summoneri
 “ faciemus archiepiscopos, episcopos, abbates, comites, et majores
 “ barones regni sigillatim per literas nostras. Et præterea faciemus
 “ summoneri in generali, per vice-comites et ballivos nostros,
 “ omnes illos qui in capite de nobis tenent ad certum diem, se
 “ ad terminum 40 dierum ad minus, et ad certum locum et tempus, in omnibus literis illius summonitionis causam summonitionis illius exponemus. Et sic factâ summonitione negotium
 “ ad diem assignatum procedat, secundum consilium eorum qui
 “ præsentés fuerint, quamvis non omnes summoniti venerint [b].”

SOME authors have thought, that by the clause “ et ad habendum commune concilium, &c.” immediately following the grant

[a] Hody Convoc. p. 261.

[b] Spelm. in Leg. Johan. p. 369. edit. Wilk.

or confirmation of these liberties to all the cities, burghs, &c. that clause must imply a grant of a liberty for them to come to parliament. But that cannot well be, because then this grant must be made to all, not only cities and burghs, but all villes and ports, which cannot be supposed. I think it, therefore, most probable that it was sometime afterwards before the representatives of cities and towns were summoned to parliament. In the great council held by Henry III at Westminster, it is plain enough, there were only the higher and lower clergy, and those of the laity who held of the king in capite [c]. But yet before, in the 15th year of King John, A. D. 1213, a parliament was held at Oxford, to which were summoned four discreet knights for every shire, together with all the knights within the king's bailliages [d]. A. D. 1236 a parliament was summoned to meet at Westminster, to grant the king a subsidy, and the persons by whom it was granted, were "archiepif. epif. abb. prior. com. et barones, milites, et liberi homines, pro se et suis villanis nobis concesserunt in auxilium 30^m. partem [e]."

To the parliament of Henry III, A. D. 1254, were summoned two knights of every county, to be chosen by it. And the king tells the sheriffs of Bedford and Buckinghamshire, that the earls and barons, "et ceteri magnates regni," had promised to be at London three weeks after Easter, with horse and arms, in order to sail into Gascony. Then he requires all those within his jurisdiction, "qui tenent 20 libratae in capite" to do the same. Afterwards he commands "quod praeter omnes praedictos venire facias coram concilio nostro apud Westm. in quindenâ paschae, prox. fut. quatuor legales et discretos milites de comitatibus (two for each) quos iidem comitatus ad hoc elegerint, vice omnium et singulorum eorundem, ad providendum una cum militibus aliorum comitatum, quos ad eundem diem vocari fecimus, quale auxilium nobis in tantâ necessitate impendere voluerunt [f]." Brady, in his introduction, says this was not a summons of these knights to parliament, but I think his reasons are not of much weight.

[c] Spelm. Cod. Vett. Leg. Henry III, p. 384. Wilkins.
of summons Hody, p. 279.

[d] Hody, p. 318.

[e] See the writ
[f] Ibid. p. 341.

IN the same year, 38 Henry III, the regents in England sent to "archiepiscopis, episcopis, abbatibus, prioribus, comitibus, baronibus, militibus, civibus, burgenfibus, et omnibus aliis fidelibus suis" of Ireland, to have a supply granted [g]. And Petit argues from hence, that if the *cives et burgenfes* were then a part of the Irish parliament, they must certainly have been so before of the English, whose form of government was copied by Ireland. To this Brady answers, that the first writ sent into Ireland, on this occasion, made no mention of *cives et burgenfes*; which is true. But this does not destroy the force of the argument drawn from the second, which does mention them.

IN 1264, 49 Henry III, was held that famous parliament at London, in the Octaves of Hilary, to which Dr. Brady consents that two knights for each county, and two citizens and burgesfles for each city and burgh, were summoned. But bishop Atterbury [h] says, that if such a change in the constitution as summoning knights, citizens, and burgesfles to parliament, had happened all at once, some of our historians would certainly have taken notice of it; which they do not. He thinks the alteration was made by degrees: knights and others had been several times called up from counties, to give account of grievances, &c, and sometimes on account of grants and subsidies.

IN 34 Edward I [i], it is said, that the prelates, earls, barons, and others, as also the knights of the shires, being met, they unanimously gave the king the thirtieth part of their goods. The others here mentioned, must have been the tenants in capite. It is probable, that they for some time came to parliament, upon a general summons, pursuant to Magna Charta; afterwards they finding their attendance a burden, and being capable of voting for, and being chosen, knights of the shire, they, at length, quite discontinued their attendance: which the great barons liked well enough they should, that the distinction might be the greater.

IN the reign of Edward I, there were considerable variations in the summons of knights of the shires. In the 18th year of this

[g] This writ is in Brady's Introduction, p. 90.
p. 337.

[i] Tyrr. B. P. p. 346, 347.

[h] Rights of Convoc.

reign

reign two or three of the most discreet knights were to be chosen for each county. This was after he had scutage granted by some members of this same parliament, before these knights came; and also before the stat. of Westm. 3d. was made. In 22 Edward I, he summoned two knights; and the day following he issued another writ, for summoning two knights more. Brady observes, Introduction, p. 151, that the variations in the number of knights in this king's reign, seems to shew that the constitution of parliament was not yet fully fixed: which, indeed, I think very probable.

UPON the whole, I think it most probable, that after the Norman Conquest, when the feudal scheme prevailed more than it had done before, the parliaments were composed, not only of the great barons, but of all those who held of the king in capite. It is plain from many passages above cited, that the tenants in capite were there, and gave other aids as well as escuage. And these tenants in capite must, sometime after the Conquest, be very numerous, as those assemblies are represented to have been. Moreover, it is also very probable, that those cities and burghs, which held of the king in capite, sent representatives; which agrees with the argument from the case of St. Albans: at least they might, if they would. By its being made an article in the great charter, that the great barons should be summoned by a special writ to each, and the lesser barons by a general summons, by the sheriff, it seems to have been reckoned a privilege to be summoned. It should seem likewise that Montfort, by summoning some, both knights, citizens, and burghesses, who were not tenants in capite, might do it with a view to have some persons less attached to the crown than they.

HOWEVER this in general is certain, that even from the Conquest, till the time that the commons were regularly summoned to parliament, there were always lower kind of men, as well as the greater barons, members of parliament. And before the Conquest, during the Saxon constitution, the commons had always a share in the legislative authority.

T R A C T V.
*Of the royal Prerogative, and the hereditary Right to the
Crown of Britain.*

SECTION I.
*Of the royal Prerogative with regard to the Making, and Provid-
ing for the Execution, of the Laws.*

IT is not my design to set forth an account of all the particulars of the royal prerogative: without mentioning those which give the crown an advantage over the subjects, as to the forms of legal proceedings, for securing its debts, &c. I shall only take notice of such as are of chief moment towards supporting the dignity of the crown, and preventing any incroachments from being made upon it by the people. And herein I shall begin with that part of the royal prerogative which regards the parliament, and is designed to keep it in a due subordination.

AND, in opposition to Mr. Sidney, I must take the liberty to affirm, that, by our national constitution, the crown hath still, as it ever had, the sole right of summoning parliaments; and, after they are met, of continuing, adjourning, proroguing, or dissolving them. It is wonderful that a gentleman of Mr. Sidney's reading should ever have thought of maintaining the contrary.

THOUGH the king is obliged to call a new parliament every seven years, yet he may suffer it to sit as little time every year as he thinks fit; and may then prorogue or dissolve it, in case the members of which it is composed should be generally of a republican or factious spirit. By dissolving it in such a case, there is a chance that the nation will chuse another of a better disposition; or at least the crown will be secure that attempts against its legal prerogative will not be carried on under the name and authority of a parliament. In parting with this right to dissolve the parliament of 1641, Charles I made the greatest step towards his own ruin: For if, after he had made those concessions he did, in favour of liberty,

liberty, and the parliament continued to push him farther, he had dissolved them and called another, it is probable he would have had one less disaffected; or if he had called none at all, the republican party would have had a much worse chance for success. On the other hand, if the crown likes the temper of a parliament, it may continue it in being for seven years together, and thereby avoid encountering with those discontents which are sometimes unduly raised amongst the people, and may have a bad influence upon the elections of members of parliament. The crown may, within the compass of seven years, stay and chuse its time for a new parliament, when these dissensions are allayed or subsided.

BUT the most important part of the prerogative, with regard to the parliament, is, that the crown hath a negative against passing any bills into acts; and can thereby prevent any thing from becoming a law to the disherison or disadvantage of itself. And for the exercise of this negative, the king is not obliged to give any reasons: it is sufficient that he judges the matter unfit to be enacted. Some of our writers, indeed, have presumed to affirm, and others to insinuate very strongly, that the crown is obliged to pass all bills that are presented to it by parliament. They quote a part of the oath taken formerly by our kings, at their coronation, as implying thus much, (viz.) "*concedere justas leges quas vulgus elegerit.*" And they infer the thing from a clause in the statute of provisors, 25 Edward III. sect. 6, which is in these terms. "The said commons have prayed our lord the king, that, sith the right of the crown of England, and the law of the realm, is such, that, upon the mischiefs and damages which happen to his realm, he ought and is bound by his oath, with the accord of his people, in parliament, thereof to make remedy and law, and in removing the mischiefs and dangers which thereof may ensue, that it may please him thereupon to ordain remedy." Upon which clause Bacon, in his discourse on the government of England, comments thus: "The rule of a king is law and counsel: unto these, in all prudential matters, he must submit his judgment and will, as he is a king." And *ibid.* part ii. p. 176, he says that, "how a double negative should yest in the house of

“lords, one originally in themselves, the other in the sole person
 “of the king (when as in no case is any negative found upon re-
 “cord, but a modest waving the answer of such things as the
 “king likes not) is to me a mystery, if it be not cleared by usur-
 “pation.” And even the house of commons, in the reign of
 William III, though they did not, indeed, go so far as to deny ex-
 pressly that the crown was at liberty to give its negative to any
 bills passed by both houses of parliament, yet, in their represen-
 tation made to that prince, they tell his majesty, that what bills
 had been agreed to by both houses, for the redress of grievances,
 or other public good, had, when tendered to the throne, obtained
 the royal assent, and that there were very few instances, in former
 reigns, where such assent, in such cases, had not been given, and
 these attended with great inconveniencies to the crown of Eng-
 land. But, as the house of lords did not join in making this repre-
 sentation, many persons, who well understood our constitution,
 thought that the house of commons pressed rather too hard upon
 the crown, in this matter. For Queen Elizabeth, at one time,
 Feb. 9. 1597, refused her assent to above forty bills, which had
 passed both houses of parliament [k]. And she also, in plain
 and full terms, asserted her right so to do, saying to Sir Edward
 Coke, speaker of the house of commons, it is in my power to
 assent or dissent to any thing done in parliament [l].

AND in Henry the Fifth's time, Rot. Parl. 2 Henry V. No. 221,
 when the house of commons challenged it as their freedom, that
 they should not be bound to any law without their assent, the king
 allowed it; but, at the same time, affirmed, that he was also at
 liberty to grant or deny what he pleased of their askings [m]. In-
 deed many of the antient laws, being penned in the way of grant,
 or ordinance, from the crown, in answer to the petitions of the
 commons, hath led some persons to imagine that antiently our
 kings made laws, by their own authority, without assent of par-
 liament. By the preamble to the constitutions at Grately, in
 King Athelstan's time, it appears as if the legislature, in civil mat-

[k] Townshend's Collect. p. 127.

[l] Prynne's Plea for the Lords, p. 411.

[m] Tyrr. B. Pol. p. 419.

ters, lay wholly in the king: and as if the bishops and other great men were convened only for their advice, and not to give any force or authority to the law [n].

THIS notion was a mistaken one: for there are proofs sufficient, that by the original constitution, the great council or parliament had a negative on the crown, in all matters; or rather nothing could have the force of law without the assent of the great council, unless, perhaps, for one age after the Norman Conquest. But then it is equally clear, and indeed more so, that the crown had, at the same time, a right to deny its assent to any proposals made by the parliament, and that, without such assent, no laws could be of force. For in the end of the statute of Merton [o], it is mentioned that “*magnates petierunt propriam prisonam de illis, quos caperent in parcis, et vivariis suis. Quod quidem dominus rex contradixit, et ideo differtur.*”

THOUGH the king was obliged to use this power justly, and for the public good, yet what was thus just and good he alone was to judge for himself; which indeed the house of commons, in King James the First's time, made no difficulty of acknowledging. They say, in the apology designed to be presented to that prince, that they knew their passing a bill could not bind his majesty [p]. And whoever considers things rightly will allow, that this part of our constitution is founded on reason and expediency, as well as in prescription. For, in a mixed government, if the supreme power had not such a negative, with regard to bills offered to be passed into laws, it would soon be reduced very low, and all authority would fall, by degrees, into the hands of the people or their representatives. This was actually the case at Rome, where, though for some time after the expulsion of the kings, the senate had, in effect, this power of a negative, because no laws could be proposed to the people without their authority, yet after some time the privilege of proposing laws to the people was usurped by their tribunes: and after this came once to be the case, there being nothing to check the impetuosity of the people, it soon carried all

[n] Collier's Eccles. Hist. vol. i. p. 176. [o] Coke's 2d Inst. p. 100.

[p] Hale of Parliam. p. 232.

before it, and bore down almost all the privileges of the senate as a distinct order, which was one great cause of the ruin of that people.

It was, therefore, a fit circumstance, in most of our Gothic constitutions, that as the crown was not allowed to make laws by its own authority, so it had a negative given to it upon any proposals made on the part of the people: and that, in order to make a sort of farther defence to it, another negative was also vested in the house of lords. If any person considers how apt the people are, like a great body of water, to be put in motion, and then to press very strongly upon, and almost bear down, every thing in its way, he will see the fitness of having such an authority to restrain and keep them in due bounds.

PERHAPS it may be thought, it is not at all presumable, that the house of commons should ever be disposed to offer any bills that are against the national interest, or unfit for the crown to pass: and I believe, indeed, that this cannot happen frequently: but that such a case is not impossible, we may learn from the experience, both of other nations and of our own. The people of Athens, in the application of public money, in the decreeing the Syracusan and Peloponnesian wars: the Roman people, in voting the Agrarian laws, in continuing the commands of provinces to Pompey and Cæsar, and in several other instances, were wrought upon to act against the public interest. And, in our own nation, in the time of Charles I, the house of commons grew so fond of extending their own privileges, that they actually overbore both the house of peers, and ruined the whole constitution. As a guard against any such excesses for the future, a negative, both in the crown and in the house of lords, is very expedient; and, if it be exercised generally in a proper manner, it will be approved, I believe, even by those of the commoners who are true friends to our constitution.

As to the execution of the laws, the crown has likewise such powers as are sufficient, both for its own safety, and for the protection of its subjects. There is indeed in the cities, and most other corporate towns, civil authority, in some measure, independent

pendant on the crown; because, by virtue of charters granted them by former princes, they are authorized to chuse their own civil magistrates from among themselves. These magistrates, for maintaining the peace, suppressing disorders, and giving course to justice, can, in most cases, act without any new warrant from the crown; and can, in some cases, even put subjects to death without its assent [q]. But this authority seldom reaches any farther than their own precincts: and their exercise of it is cognizable by the judges of the superior courts at Westminster, who, though they be for life, as has been before observed, yet are, at first, appointed by the king, and may therefore be reasonably supposed willing to take care that the royal prerogative be not impaired.

THE other part of the people, who do not dwell in corporate towns, is more immediately subject to the jurisdiction of the justices of the peace. These officers succeeded to the antient conservators of the peace, and were antiently elected by the people; and there have been several parliamentary applications that the justices might still be so chosen: but this would have been inconvenient; and the crown has very fitly reserved the power of appointing them, with commissions during pleasure.

THE writs, and other forms necessary to the course of civil justice, are executed by the sheriff, who is an officer also appointed by the great officers of the crown. Formerly he was chosen by the freeholders, but this was found inconvenient, and so the appointment of him was vested in the great officers of state. He has the command of all the power of the county, or of all the civil force that can be raised therein, except in the several jurisdictions of the towns corporate: and in them no force can be used but in execution of legal processes, or for resistance of any sudden invasion. In any other case, no great company of persons can appear in arms, or in any forcible manner, without a commission from the crown. It is manifest rebellion (say the judges in the earl of Essex's case, in Queen Elizabeth's reign) to force the king to govern otherwise than according to his own royal direction;

[q] See the charters of the Cinque Ports.

and for the subject to put himself into such a strength, that the king shall not be able to resist him: nay subjects, by power, ought not to take upon them to remove evil counsellors, pretending reformation, &c. this being levying war against the king; because they take upon them royal authority, which is against the king.

If any do gather together, in a way to be reasonably suspected of ill intentions, to the number of more than twelve persons, the sheriff, or any other of the king's justices of the peace, may read a proclamation to them, as appointed by an act of parliament, made in 1 George I; and, in the king's name, may command them to disperse; after which, if they continue assembled for above one hour, they are, by so doing, guilty of felony. The subjects cannot assemble, even so much as under pretense of petitioning the king, in any great or dangerous numbers: for by 13 Car. II. cap. 5, to present a petition to the king, or either house of parliament, attended by above ten persons, is punishable.

No subject can build any castle, or other fortress defensible, without leave of the king [r]. Nor can any subject, except in cases of sudden invasion, or other danger, garrison or hold any such place of strength, or array, or bring into the field any power of armed men, without the king's commission authorizing him so to do. Nor can any subject equip or arm any ship of war, so as to act with it against any person, either a foreigner, or his fellow subject, without the like commission. For by 13 Car. II, cap. 6, the king is declared to have the supreme government and disposal of the whole militia of the kingdom, by sea as well as by land; and that no person else, nor either house of parliament, nor the two houses jointly, can lawfully pretend to dispose of any part of the same.

MR. Moyle, in his treatise of the Roman government, seems to reflect upon this as a change in our constitution from what it was formerly, and a change for the worse. "The wisdom of other nations, he says, limited the regal power, by placing the sword in the hands of the subject, which was the best security of all,

[r] Coke's 2d Inst. p. 30. Rot. Parl. 45 Edward III, and 6 Henry IV. 59.

and was the antient constitution of England, while the power of the militia belonged to the nobility and gentry, almost independent of the crown [1]. And it must be acknowledged that, in some other nations of Europe, the great subjects did, at sometimes, act as if their laws gave them the authority of the sword, to prosecute their own quarrels with one another, independantly of their kings. As Alteserra, and Count Boulain. vol. iiii. p. 400, acquaint us, that it was so in France. Nay, it was so to such a degree, that the tenants of great lords were obliged to serve them in war, even against the king himself, if he denied them justice. But the natural consequences of this practice were continual civil wars and ravages, unjust oppressions, violencies and cruelties, in that kingdom, as long as that liberty lasted. In England, under some reigns, when the imprudent conduct of our princes made the crown (weak, several of) the great subjects took the like liberty. In the statute of Marlbridge, 52 Henry III, A. D. 1267, it is said, that *temporeurbationis nuper in regno Angliæ suborta, et deinceps, multi magnates et alii justiciam indignati fuerint recipere per dominum regem, et curiam suam, prout debuerunt, et consueverunt temporibus prædecessorum ipsius domini regis, et etiam tempore sui: sed de vicinis suis, et aliis, per seipsos graves ultiones fecerint, et distractiones, quo usque redemptiones reciperent ad voluntatem suam, &c.* And in the time of King Stephen, and after, while there were many castles in England, the lords of them used to act with great oppression and violence: they used to seize provisions all about them [2]. And when a number of the barons thought fit, they used to make insurrections against the crown; for which they had then great advantages, because their under-tenants were, in a great measure, subject to them, as Boulainvilliers tells us that those in France were to their lords. But it does not appear, that it was ever legal, in England, for any subject to take arms against the king, or even without his permission or commission. On the contrary, it is true, as by 13 Car. II. cap. 6, it is asserted, that the supreme

[1] Moyle of the Roman Governm. p. 105. [2] See Stat. West. chap. 7. in Lord Coke's 2d Inst.

government, command, and disposition of the militia, and of all forces by sea and land, and of all forts and places of strength, is, and, by the laws of England, ever was, the undoubted right of his majesty.

BRACTON, who lived about the time of Henry III., saith "in rege qui recte regit necessaria sunt duo hæc, arma videlicet et leges, &c." Accordingly he says in another place, lib. i. cap. 8. "sunt et alii potentes sub rege qui dicuntur barones, hoc est, robur belli: sunt et alii qui dicuntur vavasores, viri magnæ dignitatis: sunt et sub rege milites, ad militiam exercendam electi." And Fleta, lib. i. cap. 17, says "habet rex in manu sua omnia jura quæ ad coronam et laicalem pertinent potestatem, et materialem gladium qui pertinet ad regni gubernaculum." And the same appears from a statute in the reign of Edward I, A. D. 1279; it belongeth to us (saith that prince) and from us, by our royal signiory, to forbid force of arms, and all other force against our peace, at all times that we shall please; and to punish, according to the laws and usages of the realm, all such as shall oppose; and to this, the lords and commons are bound us to aid, as their good lord, always when need shall be.

AND this was but agreeable to what was practised before, by Henry III., who, while he was under the power of the earl of Leicester, issued out a proclamation for raising the militia of the kingdom, to resist an invasion. He issued other writs for securing the sea coasts; others, that the persons he had summoned should appear with horse and arms, at London, at such a time, upon pain of losing their lands and tenements; others, again, that the sheriff should detain and imprison all defaulters, and levy money in the counties for the maintenance of the troops. I have, says Tyrrel, Henry III, p. 1033, been the more exact in setting down the substance of these writs, because they prove the king's power over the militia in those times: the king being then directed by Leicester, a popular man, who would hardly have exceeded the bounds of the prerogative [u].

[u] There were many more writs of this sort issued out in Edward the First's time: see Append. to 3 vol. of Rushw. Coll. p. 200.

JUDGE Croke says, that, in time of danger, the king hath a power to command all or any persons in his kingdom to attend, with arms, at the sea coasts, or any other parts of the kingdom: and also, by his officers, to make stay and arrest all or any of the ships of the merchants, or others having ships, or as many as he pleaseth, to go with his navy to any parts of his kingdom, for the defence thereof, &c. [w]. Writs of this sort were sent, in 26 Edward III. to Yarmouth and other ports, to provide ships and mariners; and orders were, at the same time, sent to the earl of Huntington and others, to array men and guard the coasts of Kent.

HENRY II, in A. D. 1181, says Hoveden, assessed upon every knights fee, and every freeman of sixteen marks yearly, their certain arms; and the like upon every burghs and freeman of inferior value; and ordained that these arms should be kept and maintained, from time to time, in the king's service, and at his command. Thus in like manner, Will. Conq. "Statuimus etiam, "ut omnes liberi homines fide et sacramento affirment, quod intra "et extra universum regnum, Wilhelmo regi domino suo fideles "esse volunt, terras et honores suos omni fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere. Statuimus etiam et similiter præcipimus, ut omnes civitates, et "burgi, et castella, et hundreda, et wapentachia totius regni nostri "prædicti singulis noctibus vigilentur, et custodiantur in gyrum, "pro maleficis et inimicis, prout vice-comites, et aldermanni, et "præpositi, et ballivi, et ministri nostri melius per commune concilium ad utilitatem regni providebunt. Statuimus et firmiter "præcipimus, ut omnes comites, et barones, et milites et servientes, "et universi liberi homines totius regni prædicti habeant et teneant "se semper bene in armis, et in equis, ut decet et oportet, et quod "sint semper prompti et parati ad servitium suum integrum nobis "explendum, et peragendum, cum semper opus adfuerit. Statuimus etiam et firmiter præcipimus, ut omnes liberi homines "totius regni prædicti sint fratres conjurati ad monarchiam nostram,

[w] *Rushw. vol. ii. p. 196. Append.*

“et ad regnum nostrum pro viribus suis et facultatibus contra
 “inimicos pro posse suo defendendum, et viriliter servandum, et
 “pacem et dignitatem nostram, et coronæ nostræ, integram obser-
 “vandam.” And even the Saxon laws speak, very often, of pre-
 serving the king’s peace; and of persons who had lands or chat-
 tels, and were obliged to furnish so many men, or so much money,
 ad regis egressum [x]. Thus “ego Æthelstanus rex declaro, quod
 “inquisiverim, quod pax nostra pejor observetur, quam, mihi
 “placet, vel quam Greatanlea dictum erat: et sapientes mei
 “dicunt, quod hoc nimis diu pertulerim [y].”

FROM cap. 35. of the laws of Edward the Confessor, Tit. de Heretochiis, it appears, that those officers, who had some com-
 mand over the military forces, under the king, were indeed chosen,
 one for each county, in the full folkemote, by the freeholders;
 but then they were chosen “ad conducendum exercitum comi-
 “tatus sui, juxta præceptum domini regis, ad honorem et utili-
 “tatem coronæ regni prædicti, semper cum opus adfuerit in
 “regno.” Sir Henry Spelman says, that William the Conqueror
 first sunk this office of the heretocks into that of the earls.

THE king can raise what number of men he thinks fit in any
 case of danger: he cannot indeed keep them up for any time,
 without consent of parliament; and in this respect the prerogative
 is duly tempered. But this right which he has of levying forces,
 and which no subject has, are things certainly very expedient for
 the public safety. King Charles I had reason to contend that the
 disposal of the militia was his right: and the parliament, of 13
 Car. II, did well to restore it to the crown; not only as it was
 an antient, but an expedient part of the prerogative; and so it con-
 tinues to be at present: so that the crown is competently guarded
 against intestine commotions.

[x] See Judicia Lond. apud Wilk. Legg. p. 71.

[y] Ibid. Wilk. p. 62.

S E C T. II.

Of the royal Prerogative and Dignity in other Respects.

THE power of making war and peace, with regard to foreigners, is vested wholly in the crown: for though it may be very true, that our kings have often consulted their parliaments, upon such occasions, yet this has been only from the consideration of the supplies requisite to carry on the war; and not that the right of determining either war or peace is not wholly in the crown, as Dr. Davenant, in his Essay on war and peace, has endeavoured to prove: for that the crown has this right entirely in itself, our best lawyers and antiquarians have allowed.

SMITH, de Rep. Angl. lib. ii. cap. 4, saith “Rex, reginave, “summam pacis bellicue denunciandi potestatem habet. Bellum “indicit: pacem aut inducias rursus paciscitur vel suo vel concilii “sanctoris arbitratu.” Sir Walter Raleigh, Maxims of State, p. 3, says, “that monarchies are of two sorts, touching their “power and authority. First entire, where the whole power of “ordaining all state matters, both in peace and war, doth, by law “and custom, appertain to the prince; as in the English kingdom, “where the prince hath power to make war, leagues, and peace.” Lord Chief Justice Coke, in Calvin’s case, saith, that the king only hath power to make war and peace. The king may conclude upon war or peace, without calling his great council; and all the subjects of England cannot do it without the king [z].

IN 4 Edward III, the commons petitioned, that the king would enter into certain covenants and capitulations with the duke of Brabant; in which petition also there was somewhat asserted about money matters. The king’s answer was, that, what concerned the monies, they might handle it and examine it, but touching the capitulations and peace, he would do as he thought good. And even the house of commons, in James the First’s time, say, that

[z] Rushw. vol. ii. p. 552.

to the royal authority, and to that only, it does belong to resolve on peace and war [a].

THE majesty and dignity of the crown at home is not less provided for: it has the greatest respect and reverence paid to it. The king is served upon the knee, and the law has made it honourable for the greatest lords to serve him and his family: every one is obliged to stand uncovered in his presence, and even in that of his chair of state [b]. The law considers his person as sacred and inviolable, so that only to imagine or intend his death is high treason, when this intention appears by any overt act, though, in other cases, "*voluntas non reputabitur pro facto.*" The law considers the king as incapable of doing any wrong, of any infamy, lachesse, negligence or folly [c]. If there be any instances of mal-administration, the fault remains wholly upon his ministers; who may indeed be called to an account, by parliamentary or other legal proceedings. But the character and person of the king himself, in the eye of the law, remain wholly uncharged; and while that has its course, no forcible resistance can be practised against him or his authority.

THOUGH most of the antient crown manors are now alienated, yet still the king has a revenue sufficient to maintain the splendor of his court. Our antient kings, says Fortesque, in his difference between absolute and limited monarchy, were possessed of a fifth part of all the lands in the kingdom, except those that were in the church. And the author of the royal treasury computes, that the improved value of the lands that were formerly in the crown, would be worth above a million sterling per annum; though, in Henry the Sixth's time, it was represented to the commons, that the revenue of the crown was but 5000*l.* per annum, and the expences of the household itself amounted to above 24,000*l.* per annum. But there is now a fixed revenue settled on the king, by parliament, for life, of 800,000*l.* per annum, issuing out of the customs, excises, and other funds, that will rather afford a

[a] Daven. Essay on Peace and War, p. 204.
Angl. lib. ii. cap. 4.

[b] Smith, de Rep.

[c] See Finch del Ley; apud Sheringham Royal
supreme, p. 34.

surplus,

surplus, than fall short of that sum: which if it should ever do, yet it is to be made good to the king by parliament.

AND in order to his rewarding his well-deserving subjects, the law has made him the fountain of honour, not only of the lesser degrees, but of the peerage itself; which, without any controul, he may bestow on whatever persons he thinks fit. Some authors have insinuated, that this part of the prerogative, as it hath been of late exercised, hath been a kind of usurpation; for that antiently, and by right, the crown ought not to make any peers, without the consent of the other peers [4]; but this is certainly a mistake.

INSTEAD of the antient means of rewarding its dependants, by the grant of wardships, marriages of heiresses, and the like, which were, as hath been already observed, very burthensome and oppressive to the nobility and gentry of England, the crown has, at present, great numbers of honourable and profitable places and preferments in its gift; not only those that were formerly in the crown, but many more, arising from the funds, and the increase of property in the kingdom, since the revolution. In a word, by itself, or by those whom it appoints, the crown has the grant of all places of trust and profit, as well ecclesiastical as civil and military.

IN the conferring of bishoprics, the crown is no longer embarrassed, as it formerly was, and as several of the popish princes now are, with the intervention of the pope; who must grant his bulls, without which a bishop cannot be consecrated, and will therefore have some interest in the new bishop, as well as his sovereign. Nor is the crown under any check from the choice of its subjects interfering with its own. Its sole *conge d'elire* is effectual. For though its letters patents of leave to the dean and chapter of the vacant see are only, in general, a warrant to them to chuse a person devoted to God, and useful and faithful to his majesty and his kingdom, yet by his letters missive thereto joined, he names and recommends some particular person, to be chosen.

[4] Thus West, St. Amand, and others.

bishop of that see : and the chapter is not at liberty to refuse the person nominated, or to chuse another, without incurring the penalties of the statute of præmunire : nor will this refusal, if they are even willing to submit to those penalties, have any effect. For the person so nominated must be consecrated by the archbishop or bishops, commissioned to do it, under the same penalty : so that it is properly in the power of the king only to make any person be chosen a bishop, and to vest him with his temporalities, and particularly with his peerage, and a right to sit and vote in the legislature, as a member of the house of peers ; by which means the crown may have an opportunity to form a considerable interest in that house : and the king only can translate bishops from one see to another. And as the bishops have a great authority over the clergy, the king may by their means influence these latter.

NOR has he this influence only from creation of bishops, but from that also of temporal peers, whom he may make at any time, and in such number as he thinks proper : for this power our constitution has entrusted to the king's sole discretion. There have indeed been some murmurs, of late years, with regard to the exercise of this power ; and some persons, as I have already observed, have insinuated, or almost affirmed, that the crown has not long had it in the manner it has at present. For that antiently the peers were all made in parliament, and with the consent of that body ; and, according to the original constitution, they ought to be so [e]. But these notions have no other ground than certain imaginations about the antient nature of the feudal constitutions in general, and ours in particular : which notions are false.

ST. AMAND says, that by the feudal law, to which, our law being built upon it, we ought, in dubious cases, to resort, no peer could be made without the consent of the other peers. For which he quotes Hottoman's *Franco-Gallia*, where the passage, indeed, in the English translation, does say so much. But in the original it is, "*quemadmodum pares curtis sive curiæ feudali jure, neque*

[e] Thus says the author of the *Enquiry into the manner of creating peers*. The author of the *Lex Parliam.* p. 22. 24. St. Amand, in his *Essay on the Legislature*, p. 163. 171. and Tindal, in his notes on Rapin's *Hist.* vol. i. p. 157.

" *creari,*

“creari, nisi pro collegio,” *i. e.* in presence of the college (for thus Livy) “laudati pro concione omnes sunt [f]” not with their consent. Thus a copy-holder must be admitted in court, or in the presence of other copy-holders, though their consent be not requisite thereto. And, in fact, it is plain that in France and Germany, from which countries we copied, with regard to our dukes and earls, these honours were conferred by the sole appointment of their kings and emperors. Thus Greg. Tur. lib. vi. cap. 26. “Igitur pervasis Chilparicus civitatibus Francis suis, novos comites ordinat.” And Fortunatus, lib. x. cap. 23. “Ad Galaetorium comitem Burdigalensem (apud Alteserram, p. 13.)

“Crevisti tandem quod debebatur, amice;

“Ante comes merito, quam datus esset honos.

“Judicio regis valuisti crescere iudex,

“Famaque quod meruit regia lingua dedit.”

Idem ad Ligoaldum Comitem, lib. x. cap. 22.

“Rex Childebertus crescens te crescere cogit,

“Qui modo dat comitis, dat sibi dona ducis.”

And the like was done among us in England: our kings certainly made earls, when those dignities were only officary, as they were in the Saxon times. “Regum est (says one of our Saxon kings) “constituere comites et duces [g].” And there are many instances wherein they made and removed them, without any mentioned interposition of the witenagemote. King Alfred gave the earldom of Merchland to Ethelred, who married his daughter Ethelfleda [h]. William of Malmesbury, p. 71, says, that Edmund Ironside, upon marrying the widow of the earl of Northumberland, desired that earldom of his father King Ethelred. And the same author, p. 83, says, that “proinde si subditos velit, Marcherium filium “Elgari iis præficiat rex. Rex Edw. Confessor in iram promotus, “dimissâ reginâ, thesaurum suum et terras ei (*i. e.* comiti Godwino) “abstulit, deditque Othorîi consultatum Davenescire et Somersete “et Dorset. Algaro vero filio Lefrici dedit comitatum Haroldi [i].”

SPELMAN, in Vit. Gulielm. Conq. p. 286, says, that “comi-
“tatum enim nulli, tum (*i. e.* in the Conqueror’s time) jus hære-

[f] See Cooper’s Diction. in voc. PRO.

[h] Selden’s Titles of Honour, p. 650.

[g] Saxon Chron. p. 49.

[i] Hen. Hunting. lib. vi. p. 356.

"dirarium. Sed præfecti, qui comites dicebantur, officarii erant, et magistratus a rege ad arbitrium dati et semoti, prout illi hodie quos comitatum appellamus locum tenentes." The Conqueror, in imitation of what was done not long before in France, by Hugh Capet, made the earldoms in England, at least to his own followers, hereditary: but still the right of conferring them remained wholly in the crown. Henry I, created Richard Redvers: "in comitem Devonie tertium denarium annui exitus ejusdem comitatus illi concedendum consequenter creavit [k]." The empress Maud created Robert Fitz-roy earl of Gloucester; and Milo earl of Hereford. Her patent to the latter, which is thought to be the oldest now extant, may be seen in Selden's Titles of Honour.

BRACTON, who lived about Henry the Third's time, speaking of Comites, who are also called Consules, says, "Reges sibi tales affociant ad consulendum et regendum populum Dei, ordinantes eos in magno honore potestate et nomine." And even the reciting part of an act of parliament acknowledges this power [l]. "Pro eo tamen quod hujusmodi creatio ducum, five comitum ad solum regem pertinet et non ad parliamentum." The commons, in 50 Edward III, requested the lords that they would make prince Richard of Bourdeaux, grandson of Edward III, prince of Wales. The lords answered, that this laid not in them, but in the king only, so to do; to whom they promised to be mediators therein [m].

THESE authorities appear sufficient to prove, that this right is not only at present settled in the crown, but is so rightfully, according to the antient constitution, and to be exercised at the sole discretion of the king. These honours, which at first were temporary, are now always conferred for the life of the party, and their right heirs, and often for their heirs in general. And bishoprics, which, in Edward the Sixth's time, were also taken "durante beneplacito," are also, very justly, for the life of the parties who have them: and the case is the same with the judges, and others, who hold their places by patents, "quam diu se bene gesserint."

[k] Selden's Titles of Honour, p. 680.

[l] St. Amand's Essay, p. 178.

[m] Cott. Abr. p. 123, 124.

But

But most of the great civil offices, and all commissions military, are only "*durante beneplacito regis*:" so that upon any personal offence, or suspicion of ill conduct, which the king may know, though he cannot make it appear in a course of law, he can discharge such unfit persons from his service; and, by his power, he can keep all such persons within the bounds of due respect and constant attachment.

AND the king may not only reward well-deserving subjects, but also pardon those who have committed criminal actions, with such circumstances as should in reason recommend them to mercy. To remit the punishment of those who offend of malicious wickedness, and are likely to do the same for the future, would be against the interest both of the public and of the king himself. But there may be cases of such who offend ignorantly, or inadvertently, or through passion, or who have been cast by prejudiced juries, or by the utmost rigour of the law. And these it may be not only the interest of the public to pardon, but the king may hereby gain an interest in the hearts of his subjects, by exercising mercy. And therefore our constitution hath settled this high prerogative in the king. Legg. Edwardi, p. 201. N^o. 18. "*Jam si quispiam rei capitalis reus poposcerit regis misericordiam pro foris facto suo timidus mortis vel membrorum perdendorum, potest ei lege suæ dignitatis condonare, si velit etiam mortem promeritam.*" And the statute 9 Edward IV. chap. 2. says "*a chascun roy, per raison de son office, il appent à faire justice en execution des leges; grace en granter pardons, &c.*" The king can both remit the penalty and pardon the offence, not only in the case of misprisions, trespasses, contempts, and other such offences, but also in the case of felonies, murders, and treasons: and this not only before the party has been indicted or attainted of them, but afterwards.

IT is true, that the king's pardon is not pleadable to an impeachment of the house of commons, for treason or any other crime; and that, in the case of murder, there are some statutes that seem to put some measure of restraint upon this prerogative. In 2 Edward III. chap. 2, it is said that, whereas offenders have

been greatly encouraged, because charters of pardon have been so easily granted in times past, of man-slaughters, robberies, felonies, and other trespasses against the peace; it is ordained and enacted, "que tiels chartres ne soient pas grantées, lorsque en cas où le roi le peut faire par son serment; cet assavoir, en cas où home tué autre soi defendant, ou par infortune." And 4 Edward III. chap. 13, it is said, because divers charters of pardon have been granted of felonies, robberies, and manslaughters, "contre la forme de l'estatut, fait à Northampton, contenant que nul home n'aueroit tiels chartres hors du parlement, par ount les messieurs ont este plus esbaudiz de meffaise, si est accordé que mesme le estatut soit desore garde et meyntenu en touz pointz." And again 14 Edward III. cap. 15. it is assented, established, and accorded, that no charter of pardon of the death of a man, nor of other felony, shall be henceforth granted to any man, but in case where the king may the same do, saving the oath of his crown, as it is contained in the statutes made before this time. From whence it has been imagined that the king was, by these statutes, disabled to pardon murder, out of parliament.

BUT the contrary appears from 13 Richard II. cap. 1; for the commons having complained, that treasons and murders, and rapes, were commonly done and committed; and the more because charters of pardon have been easily granted in such cases: the said commons requested our lord the king, that such charters might not be granted: to whom the king answered, that he will save his liberty and regality, as his progenitors have done heretofore. But he grants that no charter of pardon for murder shall be henceforth granted, unless the same murder be specified in the charter. Hence therefore, this act, by saving the king's regality and liberty, and expressing how the pardon of murder shall be granted, easily implies, that the king may lawfully grant such a pardon, with this condition.

LORD Coke, indeed, says [n], that the intention of this act, of 13 Richard II. cap. 1, was not that the king should grant a par-

[n] 3d Inst. p. 236. cap. 105, of pardons.

don of murder, by express name in the charter, but because the whole parliament conceived that he would never pardon murder, by special name, for the causes aforesaid; therefore that provision was made. But this gloss is plainly forced and unnatural; and there was no occasion to dispute this till after the Revolution. The practice indeed has been for succeeding kings, in their grants of pardon, to dispense with this statute of 13 Richard II. In the pardon, granted by King James I to the countess of Somerset, for murder, there is a clause of non obstante to this statute of Richard II, or to any other statute [o]. But the statute of William and Mary, taking away from the crown all dispensations with acts of parliament, led some lawyers to think that the crown cannot now pardon murder. But it was, with very good reason, adjudged otherwise, in the King's Bench, 3 William and Mary [p]; and the king's pardon was allowed without a clause of dispensation; so that the king can now pardon murders.

IN every case of murder, indeed, the next heir may have an appeal, which the king cannot bar; the person charged with it, even though he has been indicted and acquitted of it at the king's suit, yet may be tried again upon the appeal, and if, in that trial, he be found guilty, the king cannot pardon him, because the penal satisfaction which the subject is to have for the death of his near relation, is supposed to be an interest belonging to the subject; and it is a maxim in our law (Bracton, lib. iii. fol. 132, apud Coke 3d Inst. p. 236.) that "*non poterit rex gratiam facere cum injuria et damno aliorum. Quod autem alienum est, dare non potest per suam gratiam.*" For this reason likewise the king cannot pardon upon an appeal for robbery, rape, or mayhem. Nor can he pardon a nuisance; nor costs due by a sentence in the ecclesiastical courts.

BUT where the subject is not endamaged, and the penalty incurred would be solely to the benefit of the king, in those cases he can pardon. However, in order that the validity of the pardon may be known, it must be drawn up, and pleaded in due manner;

[o] State Trials, vol. i. p. 350.

[p] 2 Salkeld, p. 499.

that

that is, it must have an express mention of the crimes committed, and of the proceedings that have been had upon them, viz. indictment, conviction, or the like, that it may not be presumable that the king was deceived: and the pardon must be pleaded before the courts of justice where the culprit is tried. In these cases the pardon will hold good; and though, without express words for restitution, it will not restore the forfeited goods and lands, yet with such words, it will restore them: and will even restore a man to his credit and character.

WHEN a man has been attainted by act of parliament, he cannot be restored in blood again but by act of parliament; but, by the king's pardon, the issue which has been born to him after his attainder will be rendered capable of inheriting: so that upon the whole this is a prerogative capable of being exercised very much to the benefit of the subject. Moreover every man in office, and every other man, if required, is to take a solemn oath of allegiance to the king; and not only so, but likewise an oath of abjuration of the authority of the pope, and of any right in a pretender to the crown of Great Britain.

By these great branches of the royal prerogative, and several other advantageous ones of lesser moment, that might have been mentioned, the crown is enabled to support its majesty and dignity; and will, if any prudent measures of conduct be observed, be able to obtain generally both the respect and affection of its subjects, and those of the two houses of parliament. And, in such a case, it will be able, if not to do so much harm in the world as absolute princes can do, yet often to do as much or more good than they can.

Now this is the situation which wise men have thought the happiest for princes to be in. Diodorus Siculus tells us, that “Ægyptiis regibus (olim) neque judicandi, neque pecuniam congregandi, neque puniendi quemquam per superbiam aut iram, aut aliam injustam ob causam licentiam permissam, sed veluti privati tenebantur legibus, neque id ægre ferebant, existimantes parendo legibus se beatos fore [q].” And that very good patriot,

[q] Lib. ii. p. 41.

as well as courtier, Sir John Fortescue says, "that the power of
" an absolute prince is attended with much more difficulty in the
" execution of it, and with less security both to the prince and to
" the people; so that a wise prince would not wish to change the
" political form of government for the absolute [r]."

MONSIEUR de Fenelon, late archbishop of Cambray, though he
was himself born under an absolute government, could not forbear
expressing his sentiments to the same purpose. He observed, to a
person whom he thought to have some concerns with his kingdom,
" les avantages qu'il pouvoit tirer de la forme de government de
" son pais, et des égards qu'il devoit avoir pour son senat. Ce
" tribunal ne peut rien sans vous. N'etez vous assez puissant.
" Vous ne pouvez rien sans lui: n'etez vous heureux d'avoir les
" mains liees quand vous voulez faire le mal, et d'avoir un conseil
" supreme qui modere son autorité [s]?"

It is our happiness, at present, to have a prince of that dispo-
sition which Monsieur de Cambray recommends. He truly de-
sires to be esteemed and loved, as well as submitted to, by his sub-
jects: and hath given proofs sufficient of this disposition, by
never having made any wilful breach upon the laws. His known
bravery, and true greatness of spirit, do not transport him into any
fallies or excesses hurtful to his people: in which, as he has copied
after his royal ancestors, so has he the pleasure to see the same
noble, benevolent spirit in all his family. And the divine Provi-
dence, having made this family so flourishing in the number, as
well as in the aimable qualities of those who compose it, seems to
have made so far a provision for the lastingness of our felicity.

In these circumstances, one would hardly think it possible, that
many persons should be disaffected to our present establishment,
under the present family; I mean from a principle of regard for
the public welfare of this nation. But as there may still be some
who are not satisfied, as to the justice, or rightfulness, of the
grounds upon which it stands; I will, therefore, give a short ac-
count of the grounds upon which they oppose, and we vindicate,
the lawfulness of our present civil establishment.

[r] De Laud. Leg. Angl. cap. 36.

[s] Vie de Fenelon, p. 183.

S E C T. III.

Of the Opposition made to King James II at the Revolution.

THE adversaries of our establishment affirm, that the revolution was founded on such an opposition to the prince, then on the throne, as was contrary to natural reason, and yet more plainly contrary to the Christian religion; and was, on these accounts, a transaction never to be justified, and consequently could not give a right to those who found their title upon it; especially as the throne was, at first, and has ever since been, possessed in exclusion of the next heir, and of others nearer in blood to the abdicated prince than the present possessor is; which exclusion is contrary both to the divine law, and to the law of England.

I do freely allow, indeed, that natural reason not only prescribes obedience to civil governors, when they act in pursuance of their great trust, but strictly forbids any opposition or resistance to them, even when they act against it, supposing that the ends of civil government, according to the politics of the country concerned, can be obtained by such submission to their government. For, considering, both the sad effects, viz. murders, oppressions, devastations, &c. that usually and naturally are produced by such resistance; and as well the sacred nature of the authority violated thereby; it must plainly appear, that when it is not necessary and just, it must be a very heinous crime. Plato compares those persons who resist those governors, in such a case, to the Titans, who were said to have rebelled against Heaven. And it is certainly true, that civil government, and those who administer it, ought to be considered, conformably to the sentiments of many other ancient writers, as well as the sacred ones, as being derived from the supreme being, and having its authority from him. For he has put mankind into such circumstances, or they are in such at least at present, that civil government is necessary, in order to their security and happiness in social life. Therefore that Being, who certainly intends the happiness of his creatures, must be supposed to

to intend that they should live under civil government. And to this purpose he must be supposed to give the civil governors a right to take away the lives of their subjects, when their doing it is necessary in order to preserve or contribute to the welfare of civil government: which right they could not have without his permission. And by his providence, which either influences or permits all things which come to pass in the world, he sometimes raises men to the government of nations, and supports them in those posts.

IN all these respects, we allow that civil governors, and their government, may be said to be under the immediate influence of the supreme being; and that it was designed by him for the good of mankind. And from hence, indeed, it follows, that subjects are bound to yield all such submission to their governors as will be necessary to the same purpose. But that it is the divine will, that subjects should never, in any case, oppose or resist their governors, even though they make the most unjust and tyrannical use of their authority, we cannot justly conclude from any of the considerations which have been mentioned, relating to the divine origine of civil government.

FOR, in order to make these conclusions justly upon those grounds, it must either appear that nothing less than an obligation to absolute submission and non-resistance can make civil governments effectually answer the ends for which the supreme being designed them; and therefore that he will have no resistance ever practised, in regard that it would be repugnant to the safety or welfare of the governed society: or it must be supposed, that the supreme being does, out of mere regard to the safety and dignity of the governors only, without any regard to the governed, forbid these to resist in any case.

BUT this latter supposition cannot possibly be true: for the divine power could not make mankind for the benefit or lust of a few only; for there is no respect of persons with the creator; he created all alike; and, therefore, must principally design the good of the many, *i. e.* of the governed. And if this be certain, then there cannot be any ground to suppose that the supreme being

forbids resistance in all cases; because such a prohibition would, in several cases, quite defeat the ends for which government was instituted. For such is the corruption of human nature, that princes may, and do, in some cases, make the generality of their subjects very miserable: they may kill, torture, ravish, plunder, &c. or allow others to do it. These miseries may fall actually on a large number, and the fear of them may reach to all, and render them miserable. Now can it be supposed that a being of infinite perfections, who instituted government for the welfare of the governed, can be unwilling that such a miserable people should free themselves from such grievous circumstances, which their princes are highly unjust in bringing upon them: even when it can be done with much less damage to the public than it actually suffers under such a tyranny; and when the resistance necessary in order thereto may probably contribute to put things upon a regular and good foot again, and may produce a reformation of the prince? such a supposition seems visibly inconsistent with the divine perfections, and with the end of government. And, on the contrary, it seems most agreeable to the perfections of the supreme being, who instituted government for the happiness of mankind, that when this end is defeated, in a great measure, by the fault of their governors, who have no right at all so to act, and this ill consequence can plainly be prevented or remedied, without any great harm, or even with good to the public (as in several cases it may;) I say, it is then most agreeable to the perfections of the supreme being to suppose, that he is willing, and even desirous, to have such disorders corrected in every society, be it greater or lesser; and that regularity, right, and happiness, be restored: consequently the people have a right, and are even under an obligation to do it.

THE only argument, of any weight, that I have ever seen against this reasoning, is, that if resistance should be allowed by the supreme power, even in the case here supposed, namely when it will be for the public good; the consequence will be that the generality of mankind, who are always too partial to themselves, are apt to judge amiss of things, and therefore inclined to sedition and rebellion,

rebellion, will often break out into them, when there is no real cause for them; by which, disorders frequently happening, civil societies will, in fact, suffer much more harm, upon the whole, in consequence of a liberty of resistance, than they will have good from it, in such cases as I have at first supposed, which will happen but rarely: and therefore it is justly to be concluded, that the supreme power, who intends the benefit of mankind in general, and makes such regulations as may tend to promote it upon the whole, must disapprove resistance in all cases whatsoever; because this disallowance will tend to do the most good, or at least to prevent the most mischief upon the whole [t].

BUT, in answer to this argument, I must observe first, that the supposed natural, or necessary, consequence, upon which the argument is chiefly built, is by no means so certain as to bear the weight that is laid upon it. Or, in other words, it is a false representation of the dispositions and conduct of mankind, to lay it down that, if resistance be supposed lawful, and be actually practised by them, in any case whatsoever, for the public benefit of a society, they will, in consequence of this, be incited to resist, very often, when it will be to the great mischief of the public. The history of several nations proves manifestly that this representation is not true. Instances may be given of nations who, though they have always thought resistance lawful, and have, upon some great occasions, practised it, and even founded their polities upon it, yet have afterwards, for a long space of time, been very obedient to their governments, and quiet under them.

THIS was antiently true of the Romans, who, though they banished Tarquin the Proud, whose oppressions they could not bear, and formed another sort of government, and were afterwards persuaded that they might lawfully resist their governors if they proved tyrannical, yet they were the most submissive obedient people in the world to their lawful magistrates, as Mr. Bossuet himself acknowledges: and, for more than five hundred years, they had no civil wars or bloodshed, on that account, among them. The

[t] See Essay sur Governm. Civ. p. 64. 69.

Spartans were much in the same dispositions: and the case was the same in the kingdom of Arragon, in which a right of resistance was expressly avowed: and other instances of the like kind might be produced. Indeed men seldom rise into rebellions against their governors, unless they are provoked by severe grievances and oppressions.

2dly, I must observe, that those men, who are so ill disposed as to be seditious and rebellious without cause, would be so, whether it be supposed true that the supreme Being disallows resistance in all cases, or not: for their way of thinking will generally, be that resistance is lawful in some cases; or, whether they think so or not, they will practice it: the reasonings of others to the contrary will have very little influence to restrain their rebellious humour. This will be, in all cases, clearly owing to their fault, and not to the examples or reasonings of others, in either way, of the lawfulness of resistance, or the unlawfulness of it.

THE question then must be, whether it is supposable that the divine power disallows resistance, even in those cases where it may do eminent good to the public, only because others, through their own fault, will practice it in cases where it will do harm? Or, in other words, whether the supreme power will oblige some people to submit to irremediable misery, for want of resistance, which, in their case, might produce public happiness, only because wicked and corrupt men will resist, in other cases, to the public mischief? When, at the same time, it is true likewise, that whether he disallows resistance in all cases, or not, yet still, in fact, those wicked men will practice it.

I CONFESS this conduct appears to me plainly to be what we ought not to impute to the Deity; and what he certainly does not use in several cases, where there is a parity of reason for it. It is visible that the divine power does permit men, in civil societies, to go to law, for the defence, or recovery, of their several interests; and it is equally visible that bad men do, in fact, very often make use of this liberty to do a great deal of mischief: must it be, therefore, supposed that the divine power will allow no man to defend, or recover, his right? plainly not! In like manner, bad men

men make very ill uſe of the liberty of going to war: they make it produce much more miſery than good to mankind, upon the whole. But does it therefore follow, that the ſupreme Being will not have any men war in a good cauſe, becauſe bad men will actually war much oftener in ill ones? The patrons of non-reſiſtance will hardly ſay this; and therefore they ought to ſee that their reaſoning againſt reſiſtance in any caſe, which is plainly parallel to this, is not concluſive. The divine power cannot juſtly be ſuppoſed to will that a great number of men ſhould be immediately miſerable, without any fault of their own, only for the fault of others, and even when it is morally certain that their miſery will not contribute to remedy, or prevent, the fault, or unhappineſs of others.

THERE is another ill conſequence that will follow upon the ſuppoſition that reſiſtance is, in all caſes, unlawful, ſuppoſing that doctrine to be grounded on the reaſoning here lately uſed. Which is, that this reaſoning will extend to prove, that even in Sparta, or in Arragon, or the moſt limited governments, the executive power muſt never be reſiſted, even though, in the conſtitution of the government, there be an expreſs condition that ſuch reſiſtance may be lawfully made: ſuch a condition there was in the Arragonian government, and may be in others. Yet ſtill this reaſoning will be of force, that, if the people be allowed a liberty of reſiſting in any caſe, they may, and will, probably uſe it in others, when it will do harm to the public. Ergo, they muſt never be allowed it, in any caſe: ſo that this reaſoning will quite defeat, and render uſeleſs ſuch conſtitutions of government; and will, in a little time, make all governments abſolute. Which conſequences ought not to be admitted: the reaſoning proves too much, Ergo it is wrong.

UPON the whole, if we impartially conſult natural reaſon upon this queſtion, of the lawfulness of reſiſtance, in ſome caſes, we ſhall find it evident from thence, that it is allowable, under thoſe limitations that I at firſt put it; (*viz.*) that from the conſideration of the terrible ill conſequences that may attend reſiſtance, in ſome caſes, private ſubjects ought not, for the perſonal injuries of one,

or a few, to enter upon resistance to princes. But that, when the injuries were grievous and general, tending to the subversion of the government, &c. then the generality of the people may do it.

THESE are the dictates of natural reason; and these reasonings are not contradicted, but rather confirmed, by divine Revelation: this agrees with natural reason, in making the measure of the rights of princes and subjects derived from the act of men. Some indeed have imagined, that God made Adam, and after him Noah, unlimited, universal, and absolute monarchs: but the grants made by the divine power to them, in the Scripture, do by no means import so much; or, indeed, import any civil authority. They are no more than a grant of dominion over the inferior creatures, and of parental authority over their own families. And even if they had conveyed any civil right of government, that grant would now be wholly insignificant: because it is now utterly unknown who are the eldest descendants from those original monarchs; so that the supreme Being must, even upon that scheme, be supposed to leave the choice of civil governors to human acts. And this supposition ought the rather to have place, because our Saviour, who could easily have discovered the right heir, according to the patriarchal scheme, did not think fit to do it: but, by his whole conduct, shewed plainly that he intended not to make any alteration in the measures of civil right or obedience. He avoided making any positive determination about questions of this nature. When the Pharisees asked him an ensnaring question about Cæsar's title, he declined entering into that discussion, by saying "Render
" unto Cæsar those things that be Cæsar's (whatever they are) and
" to God the things that are God's." As if he had said, I will not take upon me to be your casuist in these matters of a political nature. Consult, as you ought, the reason of things, your national laws, the transactions between you and the Roman emperor, &c. and from thence determine what things are Cæsar's, and accordingly give him what is his right.

NOR did his Apostles any more prescribe the particular measures of the obedience or submission due to civil governors. They do indeed

indeed make pressing general exhortations, that Christians would obey and honour civil magistrates, as being the ordinance of God: and probably in so doing they might have a view to the Roman emperors. But their intent was not to determine either the lawfulness of the title of these princes, or the particular measures of submission or obedience due to them. It was chiefly to oppose a notion which then prevailed among the Jews, and from them among many even of the Christians, that no obedience or submission was due from themselves, who were the children and people of God, to heathen magistrates. Of this notion, and practices suitable to it, among the Jews, especially the Pharisees and Zealots, we have sufficient evidences in Josephus's Antiquities and de Bell. Jud.

AND though the wiser and better sort of Christians were not infected with such notions as these, yet we see that, even in the apostles time, there were many who had a wrong notion of the liberty obtained by Christ for his followers. There were some, as we find, from St. Peter, 1 Epist. cap. ii. 10, and from St. Jude, ver. 8, who carried this point so far as to speak evil of dignities, and to despise government. Which occasioned the exhortations of the apostles that they should not "use their liberty for a cloke of maliciousness, or for an occasion to the flesh; but, as the servants of God, would honour all men, love the brotherhood; fear God, honour the king." That to these sentiments and dispositions of some Christians, the apostles had a particular view, in their exhortations, is visible from the manner of them; and farther likewise from the comments of the antient fathers of the church upon them.

CHRYSOSTOM, in 23 Hom. ep. ad Rom. says that a great fame had been spread abroad, which charged the apostles with sedition and innovation, as if they had directed all their speeches and actions to the subversion of the common laws. St. Jerom, in his comment upon Titus iii. 1, has these words concerning that precept. "Propterea editum puto, quia Judæ Galilæi per id tempus dogma vigeat, et habebat plurimos sectatores." Origen, lib. ix. in epist. ad Rom. says "ordinat quidem per hæc Paulus ecclesiam Dei,

Dei, ut nihil adversus principibus et potestatibus sæculi geramus per quietem et tranquillitatem vite opus justitiæ et pietatis exerceat.

“ Si enim ponamus, verbi gratia, credentes Christi potestatibus sæculi non esse subjectos tributa non reddere, nec vectigalia pensitare, nulli timorem, nulli honorem deferre, nonne per hæc rectorum et principum merito in semetipsos arma converterent?”

And that this was the view of the apostles, we are well informed from a much more ancient writer.

IRENÆUS, in his fifth book against heresies, has the following passage. “ Sicut ergo in principio mentitus est diabolus, ita et in

fine mentiebatur dicens, ‘ Hæc omnia mihi tradita sunt et cui volo dono ea.’ Non enim ipse determinavit hujus sæculi regna, sed

Deus. Regis enim cor in manu Dei est. Et per Salomonem ait verbum, ‘ Per me reges regnant, et potentes tenent justitiam:

per me principes exaltabantur, et tyranni per me regnant terram.’

“ Paulus autem apostolus in hoc ipsum ait, ‘ Potestatibus sublimi-

ribus subditi estote. Non est enim potestas nisi a Deo: quæ

autem sunt, a Deo dispositæ sunt.’ Et iterum de ipsis ait: ‘ Non

enim sine causa gladium portat, Dei enim minister est: vindex

in iram ei qui male operatur.’ Quoniam autem non hæc de

angelicis principibus dixit, quo modo quidam audent exponere,

sed de iis quæ secundum hominem sunt potestates, ait: ‘ Propter

hoc enim tributa penditis, ministri enim Dei sunt in hoc ipsum

deservientes.’ Hæc autem Dominus confirmavit, non faciens id

quod a diabolo suadebatur, tributorum autem exactoribus jubens

pro se, et pro Petro, dari tributum, quoniam ministri Dei sunt in

hoc ipsum deservedientes.” It is evident that there were Christians,

in the age of Irenæus, who thought that the secular magistrates

then in the world were not ordained of God, but of the devil,

and upon that account refused to obey them: to which wrong

notions of theirs, the apostle had principal reference in his exhortations to obedience.

Now if this was the case, then there is no reason to press the

texts so far as some have done, as if the apostles had intended to

carry the duty of submission farther than natural reason had done

before, and to enjoin absolute submission, in all cases, to the most

tyrannical

tyrannical princes. The other view is sufficient to answer the force of their exhortations; and will best connect the several parts of that famous thirteenth chapter to the Romans.

THE chief argument by which the patrons of absolute submission, in all cases, deduce that duty from the New Testament is, the consideration that the apostle must have been sensible that the reigning Roman emperors were, at that time, persecutors, and therefore he must have had a view to them. And if they were to be submitted to, then certainly the worst of princes ought never, at any time, to be opposed. But to this I say, that when the epistle to the Romans was written, the reigning emperor did not persecute the Christians. They lived in a tolerable measure of quiet. Origen expressly says, "Non hic de illis potestatibus, quæ persecutiones inferunt fidei. Quis enim dicendum est Deo obedire oportet, magis quam hominibus. Sed de istis communibus dicit quæ non sunt timori boni operis, sed mali [a]." *to say this is to evade the chief part of the objection to submit to persecutors*

BUT, say the objectors farther, though we should allow that there was no persecution at the time when the epistle was written, yet the apostle could not but know that such would shortly ensue; and therefore he must design to guard and fortify Christians against them. To this I answer, that no one ought to presume what the apostles ought to have done: they might have several good reasons to say nothing of this matter, but to leave Christians to their natural notions of right, and of their duty, in this point. It is sufficient that we account for what they did say, without having recourse to this supposition. Besides, it is evident that St. Paul did not intend to place this case of persecution in their view, because he did not give them instructions suitable to it. This duty of absolute submission, in all cases, to all princes, and in all countries, being a point of morality quite new to the greatest part of the world, at that time, the apostle would certainly have both explained, and pressed it more particularly and forcibly than he doth, if he had meant it as a duty incumbent on all Christians.

[a] Origen, Hom. 13 Rom.
H h SINCE,

Since, therefore, neither he, nor any other of the apostles, have done this, and since their exhortations may be sufficiently accounted for upon another view, without any necessity of supposing them to mean this, we may conclude that the gospel hath not made any alteration, in this point, from what the light of natural reason might have discovered to be our duty: which is, to submit as far as the laws of the society, of which we are members, considered together with the public good, do oblige us; and to resist when it is necessary for us to do it, with regard to the same public good.

Now these being the true measures by which Christians ought to regulate their submission, the opposition made, in this nation, to King James II, and the settlement subsequent to it, may from thence be sufficiently justified. That unhappy prince did not only violate particular laws of great importance, but he discovered a settled resolution to subvert the chief part of the civil constitution; and, by destroying all the great branches of the subjects liberties, to make himself an absolute monarch. And if this had been compassed by him, the nation would not only have lost their civil liberties, but would, at the same time, have been reduced under a slavery, yet more grievous, to the pope of Rome. King James had the utmost zeal to gain that point, and must have compassed it by degrees.

In these circumstances, when two such grievous kinds of servitude were coming upon them, the nobles and people had just cause to take all proper measures to defend their rights: which when they did, by calling over the prince of Orange to protect them, the king, fearing to abide the scrutiny into his conduct that would be made by a free parliament, and the securities they would oblige him to give against the like for the future, deserted the throne, and left the nation destitute of all government, and likely to run into confusion. In this case, the peers, the gentry, and the body of the people, had certainly a right to provide for their own security and peace. And as it was visible, that these could not be hoped for, from a prince of his disposition and religion, therefore

fore they had a right to put the government into the hands of another more fit person.

BUT here perhaps it will be said, that though Christians in general might not be forbidden, either by the law of reason or by the Gospel, to resist their princes, upon such an occasion, yet the laws of England, which were in force before the Revolution, did make all kinds of resistance to the king unlawful. The acts of 12 and 13 Charles II, which vested the militia in the crown, declared that neither any person single, nor the parliament collectively, had any right to take arms against the king, or against those who were commissioned by him. And to this purpose a declaration was required to be made by every person who bore any office. Now, whatever rights the people of this nation might have otherwise had, they were then divested of them, by their own act.

To which objection I answer, that it was well known not to have been the intention of the militia act to alter the constitution, or introduce an arbitrary government. It designed to leave the subjects to their civil rights; and privileges, without a right of defending them, are of very little significance. Therefore it may be concluded, that the parliament did not intend to forbid such a defence as was necessary to secure them against the illegal attempts of the prince, and of those commissioned by him. Accordingly, when the bill was debated in the house of commons, solicitor Finch allowed, that by the king's commission, which was not to be resisted, was meant legal commission. And, in like manner, it is to be supposed, that, when the king is not to be resisted, he must act according to law, or not very grievously against the public good: and this being supposed, those laws abovementioned did not make any great alteration in the question before us.

BUT if it had been certain that the intention of the law was to forbid all persons to defend themselves, even when the king, and those commissioned by him, should act the most illegally, and endeavour to destroy the constitution, I should then make no scruple to affirm that the law would have been null in itself: since it is not supposable that the people of England should have authorized their representatives to consent to a law that would virtually

run the whole constitution, which they were intrusted to preserve. Upon the whole, therefore, the Revolution, in 1688, was rightfully made.

S. E. C. T. IV.

Of the Antient Hereditary Right, and the Breach of it, by the Settlement of the Crown which is in Force at Present.

SOME persons may object that, though the Revolution was rightfully made, as far as the ejection or exclusion of King James II, yet the hereditary right to the crown ought to have been strictly adhered to. And as this was not done then, nor in the subsequent settlement, which has taken place at present, therefore, they say, this settlement is unlawful. Some of these objectors found the indefeasible hereditary right of succession to the crown, as they do the right to absolute power, upon that which is called the patriarchal scheme. But I have already shewn that it is a sufficient confutation of this scheme that we cannot know, at present, who is the nearest and right heir, according to that scheme, in any one kingdom of the world; and, therefore, it cannot have any effect, but in encouraging all turbulent spirits to make commotions in hopes that they may get a crown, which will, in that case, according to this scheme, be their own of right.

Now it is not credible, that the supreme Power should have ordered such a plan of government, of which those who were to be the governors should be utterly unknown, and which would be naturally productive of so ill effects. If the supreme Being had designed, that the world should be governed according to this scheme of government, he would either have made the persons, to whom this right should belong, always known, or at least our Saviour Christ and his apostles would have discovered them, and have made them known for the future. Which since they have not done, we may justly conclude this scheme is utterly ground-

less and false. And if there is no ground for the claim of an indefeasible hereditary right from the law of nature, or from the holy scripture, there is certainly none from the law of England.

It must indeed be granted, that the general custom in this nation has been for the next of blood to inherit the throne: and that this proximity was, in ordinary cases, the rule settled by law: but that this was supposed to be an unalterable rule, or to give a right absolutely indefeasible, I deny; and the contrary must appear to any one who is competently skilled in the history of our own nation, or in those of the other northern nations from whom we descended. If, in order to throw some light upon our own histories, we first look into those of other nations, we shall find, indeed, that they had no small regard to the royal lineage: I must confess that we sometimes meet with the mention of hereditary right. “Halfdanus Niger, cum regnum avitum et hereditarium sibi deposceret, nemine repugnante, id obtinuit.” Snorro Stur. p. 660. “Olavus regnum successionis jure accepit.” Ibid. p. 61. “Post Ingialtum Itradæ regnum Upsalense à prosapia Inglingorum devolutum est: prisca videlicet illius familiæ, continuo ordine sibi succedentibus, stirpibus.” Ibid. p. 52. “Anundus imperium Suionia successionis jure occupavit.” Ibid. p. 42. But it is also as plain, that they did not so confine themselves to the strictest proximity of blood, as not to break in upon it when there was just reason for so doing.

We find numerous instances in the histories of both the northern kingdoms, in which the nearest heirs, for weighty reasons, as infancy, inability, or extremely ill conduct, were set aside; and others of the royal family advanced in their room, by the states of the kingdoms; who, in such cases, always looked upon themselves to have the right of thus acting for the good of the public. In about 400 years, i. e. from A. D. 1048 to 1448, when the house of Oldenburg first came to the crown of Denmark, there were about twelve deviations from the strict hereditary right of succession.

CONFORMABLY to these notions and practices of the northern nations, their colonies in these parts of Europe have acted. The Franks, in particular, under the two first races of their kings, retained in their great councils, though not the right of electing their kings upon all occasions, yet at least the right of interposing upon important ones, and taking such a person out of the royal family as they thought the good of the nation required, though he was not nearest in blood. That this practice obtained for a considerable time among them, the best French writers agree [b]. Mezeray says [c], "Les rois se prenoient toujours de la race regnante: trois conditions estoient requises pour les faire. La naissance, il n'importoit pas qu'il fut legitimé. La volonté du père: et le consentement des grandes. La dernière suivoit presque toujours les deux autres." And the Abbot Vertot has proved sufficiently that the Franks, though they had generally so far a regard to the hereditary right, as to confine their election to the royal family, yet they made no scruple to forsake the strict proximity of blood, when just occasions required them to do it; but then took any prince of the royal family who seemed most likely to promote the public good [d].

We are not, therefore, to wonder if the like freedom was used by the Saxons, who appear to have adhered to the old Gothic constitution, and to have preserved their liberties at least as much as the Franks. We find, accordingly, in our histories, accounts of frequent deviations from the strict proximity of blood: and these made not in a tumultuary way, but by the great councils, as "de jure," upon occasions that required them. And the whole nation, even those persons who might have claimed the crown from that proximity of blood, acquiesced in their exclusion. It would be too long to take notice of all the deviations in the several kingdoms of which the Saxon Heptarchy was composed; and, therefore, I shall only mention those in the kingdom of Westsex, which was the chief, and which came afterwards to be possessed of all the others. In this kingdom, from Cerdick to Edward the Con-

[b] See Hottoman, Francogallia.

[c] Hist. Abr. tom. i. p. 76.

[d] Vertot, Dissert. p. 15.

cessor, supposing them both included, there were thirty-three kings, reckoning in the four of the Danish line: and, of these, there were not above two parts in three who, when they ascended the throne, were nearest in blood to the kings they respectively succeeded. And a much less number still were, strictly speaking, the right heirs of Cerdick, by proximity of blood. This may be easily seen, by looking upon plate iv, tom. i. in Rapin's History. And from many of our antient historians it evidently appears, that many of those deviations were either made, or approved and confirmed, by the acts of the witenagemote.

OFFA acknowledged, that he was chosen "*ad libertatis vestrae tuitionem, non meis meritis, sed sola liberalitate vestra* [2]." Athelstan, though a bastard, and so could have no title, was elected; and Edred was elected and preferred before the sons of Edmund his predecessor. Edwin was deposed for his ill conduct; and Edgar elected, by the will of God, and the consent of the people. After the death of Edgar, A. D. 975, there being a great difference between the nobles of the realm, about electing a new king, some siding with Ethelred, one of his sons, others with Edward his other son: all the bishops, abbots, and nobles, assembled in a great council to determine their right title to the crown; wherein they elected Edward the Elder [f].

EDWARD the Confessor was raised to the throne by consent of a general assembly, in prejudice to the right of Prince Edward, son of Edmund Ironside, who had the first hereditary right of the Saxon line [g]. And when Edward the Confessor disposed of his kingdom in favour of William the Conqueror, as it is said in preference to Edgar Atheling the right heir, our best historians say it was done with the consent of the nobility. William of Malmesbury (speaking of the expostulations which William duke of Normandy made with Harold, by his ambassadors, about his taking the crown) says, that Harold returned for answer, "*De regno, praesumptuosum fuisse quod absque generali senatus et populi consensu et edicto alienam illi hereditatem juraverit.*" Doctor

[2] Addit. to M. Paris, vol. i. p. 422 and 423.

[f] Ingulph. p. 889.

[g] See Rapin,

Hody says, that Malmesbury's judgment is of great weight, because he wrote within sixty years after the time, and was well skilled in their antiquities.

THESE instances in the Saxon, and others that might be produced in after times, shew sufficiently, that though the nation thought themselves generally bound to adhere to proximity of blood in the succession of their kings, yet that this was not thought so indefeasibly obligatory a law, but that the great council had a right to set it aside upon very important occasions, that required their so doing for the public welfare. And this having been our original constitution, it was but in just agreement with it that the statute was made 13 Eliz. cap. 1. that it should be high treason to declare that the queen and parliament had not power to limit the succession to the crown; supposing there were just reasons for so doing.

THE act of recognition of King James the First, in what terms soever it be expressed, yet having been made while 13 Elizabeth was in force, and not intending to repeal it, must be interpreted in consistency with it. And supposing it was right in Queen Elizabeth to limit the succession of the crown, upon good reasons, the same might as justly be done by the parliament in 1680, and at the settlement of the Hanover succession.

If it be said that this statute of 13 Elizabeth supposes an act to be made by the king as well as the parliament, whereas at the Revolution the hereditary right was set aside by the lords and commons only: I answer, first, that this appears to have been several times done in the Saxon times; the next heir was set aside by the witenagemote, after the death of the preceding king, and before there was a new one elected. But if this had not been so, yet, in case of great and real necessity, all such forms and niceties of law, and even laws themselves, ought to give way to that supreme law, the safety and welfare of the whole community: for this is the great point for which all laws are made. I do agree that in this nation the hereditary succession to the crown is agreeable to law; it is for the public service; and it ought to be kept so inviolably, whenever it can be consistently with the public good.

But

But when this must be greatly endangered by adhering to it, when the whole will be at stake by so doing, then neither forms, nor any such laws, can be any longer adhered to: the substance must and ought to be preserved. All particular legal constitutions, made only for regular and peaceable times, ought to give way upon such pressing occasions; for in cases of great moment and distress, some laws we must and justly may transgress.

The only remaining question then is, whether, at the Revolution in 1688, when the next heir was an infant, in the power of his father, who was of the popish religion, and the next heirs to him in succession were all Papists, there was not such a necessity for deviating from the order of succession? or, to put the case more generally, whether this last circumstance, of the next heir to the crown being of the popish religion, will not always be a reason to exclude him from succeeding to it? From the known principles of popery, and the experience of many nations in Europe, it is evident, that this religion will probably lead a prince, who is of it, to endeavour to introduce it among his subjects. For the precepts of their religion require them to do it; and they make no scruple to acknowledge it to be their duty, even to do it by force. Bossuet, bishop of Meaux, whatever moderation he affected on some occasions, yet asks what reason is there to exempt heretics out of the number of those malefactors whom God has put the sword into the magistrate's hands in order to punish? The king of France takes an oath at his coronation, that "*haereticos ab ecclesia denotatos exterminare studebo.*" And the general assembly of the clergy of France highly applauded the late king's conduct for acting accordingly: and, in the present king's time, the same assembly have likewise desired this prince to use force for that purpose.

The clergy of that communion, as they will always be zealous and assiduous to engage princes to act in the same way against the heretics, so they will generally succeed in those applications. That society of Jesus, which, since its foundation, has most distinguished itself by its activity and fiery zeal, has almost always one of its number a confessor to each prince; who, if the prince has any

sense of religion, is ever improving and working upon it; to excite him to persecute the dissenters. If his penitent has any hours of remorse for his sins, any inclination to devotion or piety, these are always made use of to inspire a zeal for the conversion of heretics, as being the most effectual way to cover a multitude of sins: and it is not to be wondered if human nature, desirous to indulge its passions as far as possible, falls easily into a sort of piety which atones for the gratifying some passions by the exercise of others; which, instead of forcing him to forsake his darling lusts, and have an aversion to them, enjoins him to have a hatred to heretics.

SUCH a disposition, therefore, is not difficult to be raised in the minds of princes of that communion; and when it is raised, it will always be too hard for any temporal considerations, except his own interest, to balance. When a prince thinks he can gain heaven, while he has all the enjoyments of earth at the same time, no regards to the civil welfare of the community, over which he is set, could touch him, if they did appear to him. He will easily be persuaded that, though the use of force may impoverish and depopulate his kingdom, yet he ought to pursue those methods, in view to the true interest of his people, as well as to his own. So that no consideration, less than his own immediate interest, can be supposed forcible enough to withhold him, and even that will not do sometimes.

CARDINAL Bentivoglio tells us, that Philip II said, that he would rather lose the United Provinces entirely than suffer them to remain heretical; and so full of gloomy zeal was the temper of that prince, that I doubt not but he would have lost Spain itself had the case been the same. One cannot read without horror the many burnings which he made upon his going to Spain; and this after his confessor had preached in England, very warmly, of the unlawfulness of persecution. And this cruelty, by permission of the divine providence, had its effect in rooting up entirely the protestant religion in Spain: and his successors, by the same methods, kept it from entering again. Some of the princes of the house of Austria had formerly a more moderate spirit, but of late they are come into the same way of thinking. Their oppressions
of

of the protestants in Bohemia occasioned those commotions, which might easily have ended with the loss of that crown; if providence, for the punishment of the protestants wickedness, had not permitted that terrible turn of affairs which ended in the entire suppression of their religion. And since that, there has been the like danger of losing Hungary, by the oppression of the protestant subjects there: nay so zealously fixed was the court of Vienna in that disposition, that even during the last war, while they were delivered by the arms of protestants, they made the greatest difficulty of giving any tolerable terms to their protestant subjects in Hungary.

IN Silesia and Moravia, nothing but the fear of the king of Sweden could have induced them to restore the Lutherans their churches. And as soon as their fear was over, they have since practised all the oppressions they well can, in order to extirpate the protestants in those countries; and they have done it with too much success; for they that, about a hundred years since, were in such numbers, that Sir Edward Sandys says, "touching Ger-
" many I have seen an old estimate of it, by such as favoured the
" papacy, that, in the beginning of the reign of the emperor
" Ferdinand, there was not above one part in twelve of the peo-
" ple that were catholics, which now, in my opinion, must needs
" be otherwise. For comprehending in it Bohemia with its ap-
" purtenances, I should think that near one sixth part of the peo-
" ple were devoted that way; their number being increased and
" perhaps doubled since that time, by the sedulity of many of the
" prelates, and by the oppressions of the duke of Bavaria; who,
" using the advantage of the troubles of the protestants elsewhere,
" have, on their part, forced the protestants that were under their
" influence, to quit their religion, goods, or country [b]."

THE crown of France, however opposite they have always been to the house of Austria in other matters, have pursued the same conduct with regard to their protestant subjects. Though, in regard to the great power the protestant party had obtained there, and to the unsettled condition of their affairs at some seasons, they have

[b] Europ. Specul.

been obliged to tolerate the protestants, and even to allow them some privileges and securities; yet whenever they have thought it in their power to oppress them, they have never failed of raising a persecution; as appeared in the reigns of Francis II and Charles IX, at which time was that deplorable Parisian massacre, in which we see the true disposition of popery towards heretics. If the affection which Henry IV had for the protestants made him treat them somewhat better, and the unsettled condition of the beginning of the next reign occasioned their having a toleration sometimes, and good words, yet Lewis XIII and his prime minister Richlieu had always a formed design to reduce them by degrees, and in the end quite to extirpate them; which design they pursued with unhappy success as soon as they had opportunity. The late King Lewis XIV, though he had great obligations to them, for the share they had in keeping his crown upon his head, during his minority; which obligations he himself acknowledged, and at first not only confirmed the edicts of his predecessors in their favour, but even, in the most solemn manner, declared them irrevocable, yet he was soon induced, by cardinal Mazarine, to form a resolution of their utter extirpation, whenever it should be in his power: and the means to this purpose were concerted with Don Lewis de Haro, prime minister of Spain, in the Pyrenean treaty. How effectually they were pursued, we have had sufficient knowledge, from the many thousands, one might almost say millions, of his unhappy subjects, who, driven out of his kingdom, were obliged to beg or earn their bread through all the protestant countries in Europe; having, at the same time, left others, who, not being able to get away, and harrassed and tormented in manner less supportable than death itself, were obliged to abjure their religion. And it deserves to be remarked, that the zeal of this prince did not extend itself only to his own kingdom: he influenced the duke of Savoy to persecute his subjects, the poor Vaudois; declaring that, in a treaty which he had with that prince, and by which he was obliged to take arms against the king's enemies, the present Vaudois were intended to be comprehended. Their being protestants was sufficient to make them be considered as his enemies. Upon this ground

ground he joined his troops with those of the duke, either to extirpate them, or to make them change their religion, which they tried by all sorts of cruelties.

THE elector Palatine, of the Rhine, has shewn, not long since, that he did not want any incitements to this purpose. On the contrary, the remonstrances of the neighbouring powers have not been sufficient to make him desist from molesting and oppressing his protestant subjects. And that this zeal for persecuting heretics has warmth enough to keep itself alive, and even ardent, in the coldest countries, we have instances in the history of Sweden. As soon as John, king of that country, in 1571, had embraced the Romish religion himself, his next course was to endeavour to introduce it among his subjects. To this purpose he receives a nuncio from Rome, endeavours to set up an university at Stockholm for the papists, and poisons his brother, who was averse to it. His son Sigismund pursues his steps, insists upon churches for the papists in every city: brings in foreign troops to intimidate his subjects. However, he makes a truce, breaks his promise and steals away, and returns with another foreign army, of six thousand men; makes a truce again, with a promise of going to Stockholm, but again breaks his word. Upon which the states of that kingdom, being fully convinced that no trust could be put in one influenced as he was by his religion, renounce their allegiance to him; while, at the same time, to shew their regard for his family, as far as was consistent with the state of the nation, they offer the crown to his son, if he will renounce popery, but found themselves at last obliged to give it to a protestant prince, Charles IX, whom they could trust.

To come home to our own island, the queen regent of Scotland shewed sufficiently her inclination to persecute and keep no measures with heretics. And we all know what followed here in our own nation, upon the first Queen Mary's being a papist: how many bonfires of heretics it caused; how soon it effected the ruin of the Reformation that had been carried on in the reigns of Henry VIII and Edward VI; and how it would, if it had continued, probably have established popery beyond all possibility of being shocked.

shocked. It was in vain that she made the most solemn promises to the Suffolk-men, to whom she was obliged for her crown, that she would preserve their religion. They found no more mercy from her than did the rest of the kingdom. This might justly have made King James II to have been less trusted than he was; when, at his coming to the crown, he declared before his council, in the most solemn manner, that, though he was a papist himself, he would preserve the protestant religion, especially the church of England, as by law established. This declaration he afterwards repeated, in his speech to both houses of parliament, and published it in the most authentic manner. He was a prince that has gained a reputation for justice, and especially for keeping his word. But, notwithstanding all this, it is well known what open attempts he soon made upon the universities, the bishops, and the whole body of the clergy; and in how violent and arbitrary manner he proceeded, as far as he durst, both in the ecclesiastical and civil courts: how he declared too, that the reason of his proceeding contrary to all prudence, and in so violent a way, was, because he was solicitous to have the merit of converting the nation, and establishing popery here before his death.

I THINK, here has been experience enough to convince mankind, that, in general, there is the highest probability that a popish prince will endeavour, by all methods in his power, even the most violent ones, to introduce popery into his dominions. And I believe no person will quote the instances of King Charles II, and another prince, late king of Poland, to the contrary. Mankind in general are sensible what were the dispositions of the former of those princes in matters of religion, and are not therefore to wonder he should not have engaged in an enterprize in which he could not but apprehend great embarrassments and dangers. And whether the disposition of the other prince was not much the same, I leave to mankind to judge.

THE Pretender to these crowns is very well known to be of a very different disposition; he has never so much as professed any disposition to hear what could be said of our religion, as Henry IV of France did, in his distress, for that of Rome. When he was
landed

landed in Scotland, he was so far from doing this in any of his declarations, that he would not so much as promise to tolerate the protestant religion. Whether this stiffness proceeded from the influence of the high papists about him, or from his own temper, one does not know. But from which ever cause it flowed, it shews sufficiently what would be to be expected from such a person, if he was ever to be possessed of the crown. Though, indeed, should he, in view to gain these kingdoms, make any concessions in favour of the protestant religion, I could not think him fit to be trusted, in such a case, because it is a determined point in the church of Rome, that an engagement with heretics, contrary to the interest of the church, is not binding.

CARDINAL d'Ossat tells us, that Clement VIII did very much press the king of France to join with Spain, for the invasion of England; but he was answered, that the king was tied by an oath to the queen of England. To which the pope replied, that the oath was to an heretic, but that he was bound in another oath to God and the pope [i]. By which he probably meant that oath which, we are told, the kings of France take at their coronation, that they will "*universos hæreticos, ab ecclesiâ denotatos, pro viribus bonâ fide exterminare studebo.*" And an oath, to the same purpose, is taken by all popish princes. And it is well known what the resolution and practice of the council of Constance was, in such a case, in burning John Hus and Jerom of Prague, though the emperor gave them a safe conduct: the council insisting, that the emperor could not hinder the church from exercising her just authority, in the punishment of heretics, whenever she had it in her power.

AGREEABLE to the notions of this council was the declaration made by Derbyshire, an English Jesuit, in Queen Elizabeth's time; who, being in France, and speaking of Mary queen of the Scots, then in custody, said, "besides, that all the catholics in the realm of England were at her devotion, there were," said he, and thanked God, "diverse heretics that were well affected to her, which was no small miracle that God had so blinded their eyes,

[i] Card. d'Ossat, Epist. 47. ad Duc. de Villeroy.

“as that they should be so inclined to her, that in the end would
 “yield to them their just deserts, unless they returned to the
 “catholic faith [k].” And to the same purpose speaks the Letter
 (in Echard’s History) written, during the violences of King James
 the Second’s reign, when the papists thought themselves sure, to a
 person who was entirely in with the king’s measures, as to abso-
 lute power in the state, &c. but was a protestant. It is to exhort
 him to change his religion in time; and threatens him that, if he
 did not, there would be little distinction made between those
 against the king in all his measures, and those that were so in
 that point which he most set his heart upon. And that there is a
 great probability a popish prince should in the end succeed in con-
 verting the nation, I shall, without further reasoning, content my-
 self to prove by two or three authorities,

POPE Gregory XV, writing to Charles I of England, when that
 prince was in Spain, says, “and indeed you cannot give a greater
 “consolation to the people of the Christian world, than to put the
 “prince of the apostles in possession of your noble island; the
 “which will easily come to pass, and that without difficulty, if
 “you open your heart to the Lord who knocks, upon which de-
 “pends all the happiness of that kingdom.”

FATHER d’Orleans, who wrote of the Revolution of England,
 and was well able to judge of what relates to it, speaking of the
 consequence of a popish successor, says, that it must perpetuate it,
 i. e. the Romish religion upon the throne, and in time bring it
 to prevail among the people [l]. And Pere Daniel, in his History
 of France, observes, that, according to the natural course of
 things, there was no doubt, but if the then king of Navarre had
 succeeded to the crown of France without opposition, heresy
 would have become the established religion, and in time the ca-
 tholic religion would have been abolished [m].

FROM the reasons and authorities that have been here alleged,
 I take it to be plain, that the establishment of popery in the throne

[k] Strype’s Ann. Reform. under Queen Elizabeth, vol. ii. p. 86.

[l] F. d’Orleans, Hist. Stuarts, p. 298.

of Henry III.

[m] Daniel, in Abridgment

of this nation would sooner or later, and indeed in no long time, prevail to introduce, either by address, or allurements, or terror, the said religion into the whole nation. This is a consequence which is of the utmost importance, even to Deists, &c. much more to those who truly believe the Christian religion, and are desirous to practise it in its purity. There is another consequence of a popish prince's obtaining the throne, which I do not indeed regard as equally certain with the former, but which is so probable as to deserve the consideration of every one who loves his native country. It is that the subversion of the protestant religion would end also in the subversion of our civil liberties. For, first, if there should ever be a revolution in favour of a popish Pretender to our crown, it must be made by force. For undoubtedly, in all events, a great part of the nation will be firmly attached to the present royal family, and will make a stand on their behalf. Now a state of war and violence continuing for any time will give great opportunities and pretences for exercising illegal and arbitrary power: this Lord Herbert observes to have been the consequence of the civil wars between the houses of York and Lancaster. And a popish prince, who has been educated under absolute governments abroad, as every such pretender will have been, must, in all probability, be himself very much disposed to absolute or arbitrary power. And he will be put upon it farther by his adherents, who will want to have the exercise and benefit under him; especially by the clergy of the church of Rome. It is true, that in former Revolutions in this nation, some of the conquering party interposed to save the constitution, and even the clergy were zealous for civil liberty. And this conduct of the latter was founded in policy, during those times, in which they had such an influence over the people, that they could gain what points they would, or at least could preserve themselves and their interests independent of the crown. In this case, they affected to depend only on the pope. But since the reformation, and the change that has been made in the dispositions of people in general, their conduct has been different. They are every where become the instruments of bringing the whole power into the hands of one person; for getting
K k whose

whose favour, or prevailing upon his bigotry, or that of his ministers, they have a much fairer chance, than for influencing the representative body of a nation, to any measures prejudicial or oppressive to the secular or spiritual liberties of the whole. They cannot easily make transubstantiation go down, or sit easily upon the stomachs of any nation, in this enlightened age: nor can they think of preserving those gains, rising out of other superstitious practices, where there is any freedom of canvassing or judging of them, or where the people have civil liberty, and consequently a spirit of freedom, &c.

FATHER Orleans shewed plainly his way of thinking about this matter, when, speaking of King William III, and the English liberties, he said, that prince “eut plus dû contribuer à les détruire qu’à conserver, étant après le prince des Galles le plus proche héritier du roi [n].” And Sir Lionel Jenkins [o], who was very much in the confidence of King James II, lets us know what he thought that prince would have done if, after any opposition to his right, he had prevailed. “In case, says he, such a bill should pass into a law (meaning the exclusion bill) and the duke should try, as undoubtedly he would, to cut it through with his sword, and should overcome, he will have the same power to set aside all laws, both for religion and property; the power will be in the hands of the conqueror, and certainly he will change the government.” These reflections, of a person who knew King James II, may justly have great weight, in order to convince us what he was likely to do, if he had continued upon the throne; and also what will, in other cases, be likely to happen to us, if a prince of that religion should come to be possessed of the throne. Popery would be introduced; and with it slavery; or at least great confusions and miseries. Now against these consequences it is of the utmost importance to be guarded: it is, therefore, of necessity to set aside all popish princes from succeeding to the throne; and, being necessary to the public welfare, it is of consequence just. Therefore, at the Revolution and afterwards, our nation had a

[n] Orleans, Revol. Angl. tom. iii. p. 436.
p. 622.

[o] Echard's Hist. vol. iii.

right to exclude all the popiſh branches of the royal family, and to apply themſelves to the illuſtrious houſe of Hanover; which, after the popiſh branches, is the neareſt in blood. They therefore have the beſt hereditary right; conſequently, the ſettlement upon this family is likewise right.

BUT here ſome nice obſervers will, I make no doubt, be ready to aſk, is not my reaſoning in defence of reſiſtance, in this traſt, inconfiſtent with, or repugnant to, the reaſoning I have uſed, in the former part of this work, againſt the uſe of force in matters of religion? And, in order to judge the better of this matter, I will ſet forth thoſe two reaſonings.

1^{ſt}, THE reaſoning againſt force in religion, as uſed in the former part of this work.

IT muſt be admitted that force, properly applied, on the ſide of truth, might, in ſome particular caſes, be of ſervice to religion; by taking heretics out of the way, and preventing them from infecting others. But yet it is not ſuppoſable that the ſupreme Being ſhould allow ſuch force to be uſed in any caſe: becauſe if, by natural reaſon, it can be preſumed, that he allows any prince, to uſe force on any occaſion, by conſequence all princes will be obliged to uſe force whenever they judge it will be of ſervice. But to allow and even oblige all princes to do this (conſidering that princes will be much oftner in error than in the right) muſt be greatly to the diſadvantage of religion; which, on the other hand, would not ſuffer any diſadvantage, in general, but the contrary, if the uſe of force was not allowed: therefore it is not ſuppoſable, that God ſhould allow it to be uſed in any caſe.

2^{dly}, THE argument that may be formed, in like manner to this, againſt reſiſtance to princes in any caſe, muſt be nearly as follows.

CONSIDERING men as they will be, in all times, it muſt follow, that if the divine power be ſuppoſed to allow reſiſtance to princes in any caſe, even when it might do good to the public; then men will actually uſe it in many caſes, when it will do harm to the public: inſomuch, that, upon the whole, it muſt cauſe much more hurt than good to mankind. And we muſt therefore conclude, that the ſupreme Being, who deſires the good of mankind upon the

whole, will not permit that men should, by resisting in any case, use a liberty that, in event, will be so pernicious to others, by encouraging them to do it when it will be hurtful to the public: we ought to think, that, on the account of the ill consequences which may attend it, he will not allow any men to resist princes at all. But does, for the sake of the general good of mankind, oblige them to forbear it in all cases whatever.

HERE it may be asked, Are not these two arguments exactly parallel? and, therefore, if the former concludes against the use of force in religion, must not the latter conclude as strongly against resistance to princes in any case? I answer, No; the arguments are not parallel: there is a very important difference between them. In the former case, religion may do not only as well, but even much better, in the world, without the use of force. Men might be happy both here and hereafter, if they endeavoured it, even supposing no force was ever to be used in religion. But, in the latter case, many thousands of men may be often made immediately miserable without resistance. Now it is not conceivable, that God will oblige some men to continue always in such a miserable condition, merely because, if they get out of it by resistance, even when that resistance will not hurt the public, others will be encouraged to resist in improper cases. For the former ought not to be made and kept miserable for the fault of others.

IF it be said, that the general good of mankind requires they should be so; I answer, that whether some do resist, or not, their conduct would have but little influence upon others: the good of mankind will not, in fact, be much more secured by it. Resistance will always be made by the greatest part of mankind, when they are able to do it. To suppose, therefore, that God obliges men not to resist in a good cause, in regard that bad men will be encouraged to resist in a bad one, is to suppose that God obliges the former to continue in misery; 1st, On account of the fault of others, and not their own: and 2^{dly}, When mankind, in general, will have, in event, little or no benefit by so doing. But this supposition is not agreeable to reason, or to the goodness of God; and

and therefore we may justly conclude, that God will allow men to resist, when their so doing is consistent with the public good.

FARTHER, it must follow, from the abovementioned argument, that the supreme executive magistrates, even of common wealths, such as the doge of Venice, the states of Holland, &c. are irresistible, even if they act ever so tyrannically. But no reasonable man will allow this, and therefore the abovementioned argument cannot be justly conclusive. To suppose that the divine power will never have any resistance practised, is, in consequence, to encourage the malignity of ill princes, by their presuming they shall not be opposed or punished, on earth, for their wickedness.

SOME persons have maintained that paternal authority is the source of political authority; or that the latter is no more than an extension of the former to a greater number of persons. But this notion is plainly wrong. For though, indeed, the former has often given rise to, and been insensibly changed into the latter, yet they are originally things very different in their kinds: for the former extends only to what is necessary to the maintenance and education of the child, and ceases when he comes to years of discretion; whereas the latter extends to every thing that is justly or truly necessary to the maintenance of civil society, even to the taking away the lives of its members. Now though, as I have said, this latter power is derived from God, yet the particular persons who shall be at all, or at any, times vested with it, as governors of societies, are not nominated, or visibly fixed upon, by him; and, therefore, he must be supposed to leave it to the acts of mankind who the governors shall be, that shall be invested with this authority from him.

PLATO makes a conclusion of this sort, from observing that kings among men, are not like those among bees, born with marks of distinction among them. From whence, he says, it follows that the consent of men must have been the original of political power. And he gives several instances of governments formed in this way, by the agreement of many families coalescing and joining together [p]; the politics, and particularly the authority of the

[p] See Legg. lib. i.

princes, were settled by the common consent of the nation. And this must have been the case, no doubt, in many other nations: in which, therefore, the express or supposed consent of the people must have been the origin, and measure, of the right of the governors. As much right as they have derived from the original constitution, or subsequent acts of the societies, over which they are set, so much right and no more they must be supposed to have.

It is true, that free or voluntary consent has not been the only even human source or measure of the sovereign authority. Conquest has been so in many cases. When a nation engages in an unjust war, and is overcome, it falls, by the right of war, into an absolute subjection to its conqueror. And the case of their children is much the same. But there must be some terms of agreement, to submit to peaceably, even in that case, before the state of war can end [q]. However it seldom happens that a people continues long in that state of absolute subjection. By degrees the prince grants them easier conditions, &c. On the other hand, it often happens that nations free, at first, do give up their liberties in some degree; and when this has been the case, they have not a right to resume them again. For men are obliged to submit to the established policy under which they were born, unless any extraordinary oppression in the prince, or other justifiable circumstances happen, to give them a just opportunity to make better terms for themselves.

In general it may be affirmed, that the rights of princes and subjects, in the several nations of the world, depend on their transactions one with another; i. e. upon compacts, either express or supposed. The particular degrees of authority, vested in the magistrates, by these compacts, are the measures of the rights of the magistrates, and of those of the subjects. According to those measures of right, the magistrates are to be supposed to have their authority from God, and so far they ought to be, unquestionably, in all things obeyed. And it may be right not to resist them, even in some cases when they go beyond those bounds. But then it is not because they have any authority, or for their own sakes, but

[q] See Hale's Hist. of Law, p. 76, &c.

for the sake of the community. However, it is as true likewise, on the same principles, that when the good of the community may be visibly promoted or secured by resistance, it may then be as justly thought agreeable to the will of the supreme Being that all necessary resistance should be made.

T R A C T VI.

Of the Dangers that may be incident to the present Establishment, and the Prospect there is of its Continuance.

S E C T I O N I.

Of the Danger that may befall the Ecclesiastical Part of our Establishment, from Papists, Protestant Dissenters, and Infidels.

I HAVE already observed, that all human establishments are liable to some dangers, that no human prudence can foresee, and to others that no human power can guard against. If, therefore, I offer some conjectures about the probability of such dangers, and the means of avoiding them, I would be understood to do it, not in a peremptory or positive way, but with a due sense of the uncertainty of all conjectures of this sort.

As our establishment is divided into two general parts, the ecclesiastical and the civil one, so it may be proper to consider, in the first place, the danger to which our ecclesiastical one is exposed, from any of its adversaries, and what probability there is of its subsistence. The most inveterate and most active of its enemies are the papists, both abroad and at home; at the head of whom is the pope, and some other temporal powers, who may to this purpose act in concert with him, and with the papists of this kingdom. I have already observed, that the popish interest on the continent has, for the greater part of these two last centuries, very much increased; and I doubt is likely to do so still farther, by some

some of the German princes being turned papists. They have not, indeed, yet applied themselves much to the conversion of their subjects, but they will probably soon come to do it; as the maxim in Germany is "*cujus est regio, illius est religio*"

It is true, that, at present, there does not seem to be much zeal for any religion, in several courts of the continent: but this may, and probably will, in its turn succeed to the luke-warmness that reigns at present. And there is reason to apprehend, that the indifference in religion, which has of late prevailed in some protestant countries, and their employing so many popish officers and soldiers in their troops, will by degrees contribute to spread popery among the people. And when popery becomes greatly superior, or almost universally prevalent on the continent, the force of example may not a little contribute to increase it among us: for the greater part of mankind are apt to follow the multitude; especially when they are constantly solicited to it, by very great numbers of missionaries among us, who are indefatigable, and skilled in all the arts of application; and, notwithstanding our laws, are suffered to do it without danger, so that they certainly make great numbers of converts every year; and are likely to make more, if irreligion, or deism, should continue to increase among us.

POPERY is a religion very well fitted to prevail upon the lower part of mankind: and these converts among us are chiefly among the lower part of the world; and therefore some persons in power think them not worth their attention. They think they can put a stop to them when they will; and, indeed, so they may perhaps, if they exert themselves in time. But it ought to be considered, that when the lower classes of people become very numerous in a religion, they may possibly draw, or, as it were, force, the upper part of mankind into it. The Christian religion was this way propagated; and this is much more practicable in a free nation, where the lower people have votes in chusing the members of the legislature. And if ever there should be a great interest, to this purpose, formed among the low people, there would not be want-

ing perſons of quality of that religion, or of no religion, but pretending to be of that, who would put themſelves at their head, and make uſe of their numbers, zeal, and wealth, to promote this purpoſe.

I do not think there is any great danger from this quarter as yet; but I think it far from being impoſſible, or very unlikely; and that, therefore, ſome care ought to be taken about it. Not that I would, by any means, adviſe any great rigour to be practiſed againſt them: but they ought to be watched, and a careful and ſomewhat ſtricter hand to be held over them, by putting ſome laws in execution. This is a very juſtifiable meaſure; becauſe whoever is converted to that religion becomes a certain enemy to our civil conſtitution. The numbers of them in every dioceſe ought to be at proper times returned to the miniſters of ſtate: this method would have ſome effect; and care ſhould, at the ſame time, be taken, that the clergy ſhould never wholly diſcontinue their preaching againſt popery, and that the chaplains, belonging to the land and ſea forces, ſhould do their duties: in which, perhaps, for ſome time paſt, they have been too negligent. The nobility and gentry ought not to keep any popiſh ſervants in their families.

I SHALL hereafter ſuggeſt another thing which will have more effect than any of theſe; but, as that conſideration will be applicable to other matters, I ſhall forbear to mention it till I come to them. In the mean time I think, that, if proper methods be taken, we are in no great danger from the increaſe of popery among our people. The proteſtant religion, while it has the civil eſtabliſhment on its ſide, will always be able to maintain itſelf here. If the church of England ſubſiſts, and its biſhops and clergy thereby continue to be united, they will always be a ſufficient barrier againſt all the ſecret practices, and undermining arts, of popery.

BUT will the church of England continue to ſubſiſt upon its preſent foundation, conſidering that it hath many other adverſaries beſides the popiſts to contend with? It hath the Proteſtant Diſſenters of various denominations; it hath the Quakers; and it hath the Deiſts; and all theſe are continually undermining it, and may they not ſucceed? May they not render the biſhops and clergy

so very unpopular, that they may make strong pushes to take away, or much curtail their revenues; and engage the crown itself, as they did in Charles the First's time, to give them up? May they not abolish deans and chapters, and spiritual courts? May they not push at depriving the bishops of their seats in the house of lords, and make them mere moderators, or presidents of the clergy of their dioceses? May they not procure their tithes to be changed into stipends? And will the bishops and clergy, in such a state, be able to do as much as they do now against popery? No, I own that they would not; but I do not conceive that there is any great danger that they will ever be brought to this. For the sectaries themselves are likely to decline in their interest and influence; especially the Presbyterians and Independents. They have been of late much divided among themselves, about particular points of religion, so that it will be difficult for them to act in concert.

THE Quakers are the most likely to subsist; because they have a polity: but that, being founded on enthusiasm, will grow more and more relaxed till it dissolves. But if the dissenters should continue to act together, yet they will not compass the ruin of the established church: because the nobility and gentry will not come into it, and much less the court. They know that the sectaries are, all of them, upon a levelling scheme; and, therefore, though some of the nobility, have no great concern for the bishops, or clergy, upon truly religious principles, yet they will be willing to support them as barriers to themselves. Though they may dislike some bishops, at some particular times, yet they may think that others of that character may take different measures. They may perhaps come into pushing bills against translations, or selling of fines; but will hardly go farther, nor will even compass these points. The court will be disposed to protect the clergy, in these particulars: their own interest will lead them to do it; and, when they have reason on their side, they may, if they do not let things go too far, be able to protect the bishops and clergy against all such attempts.

SUPPOSING, therefore, that the civil part of our constitution continues as it is; or that the crown does not decline its power,

I do not apprehend any great danger, to the religious or ecclesiastical part of it. Let us then proceed to consider what likelihood there is, that the civil part of the establishment will subsist in its present state.

S E C T. II.

Of the Dangers that may be Incident to the civil Part of this Establishment, from among Ourselves; either, 1st, From the Undue Growth of the Regal Power; or, 2dly, From the Prevalence of the Antimonarchichal Party: 3dly, From Foreign Force, taking Advantage of Divisions among Ourselves.

AS to the alterations likely to be made in the civil establishment, by practices among ourselves, I have heard people of very different, and even of contrary, opinions. Some think that the crown is likely to increase its power, so far as even to become absolute; *i. e.* to have all the real power, either without the form of parliaments, or with the form of them only. Others, on the contrary, think that the power of the crown is likely to be retrenched, to such a degree, as to become almost insignificant, or merely nominal.

THE gentlemen who have apprehensions of the former sort, observe that the crown has, at present, so much power, from the greatness of its civil list, by the number of preferments, ecclesiastical, and civil, and military, at its command, that, if proper applications be made on its part, it may, in no long time, have the liberties of the nation entirely in its power: and that, if it should not think fit to alter the outward circumstances of our constitution, it may, by having the parliament in an absolute dependance, do every thing which it desires, as effectually, and less invidiously, than it could by having the power solely in itself.

Now here I will content myself with saying that, I believe the present king and his family have too much probity to desire to take away those liberties of a people, which providence has given them.

But perhaps it may be thought, that this is an argument more proper to silence, than convince: I shall, therefore, endeavour to shew, that it is not supposable that a prince, who is himself of good capacity, and has a true judgment in politics, or is advised by ministers of that character, will attempt to make himself absolute in this nation, while the circumstances of it are the same, or in any degree like to what they are at present. My reason for this is, because, from considering the true state and disposition of the people, from high to low, it is not in any degree probable that he should succeed in this attempt, if he was disposed to make it. I do agree that there is at present, as there always has been, in this nation, a set of men who have been disposed to make the crown absolute. But this never was the general bent of the nation: that hath at all times gone the other way. A desire to preserve the great articles of our liberty hath always been predominant in the bulk of the nobility, gentry, and people.

WHENEVER the crown has appeared to make, or been suspected to design, any attempts upon our liberties, the generality of the nation hath discovered a spirit of opposition to it: and has not been quieted, in most cases, till some farther confirmation and security to our liberties hath been granted by the crown. This any one may observe in the whole course of our history, and which, indeed, may be seen from the instances that I have given, in these papers, of the progress of our liberty. But this spirit of liberty and watchfulness, against all attempts of the crown, was never more strong, or more general, or had greater opportunities of exerting itself, than at present. The tenures, with the legal obligations resulting from them, and the penalties upon the breach of them, and the power in the crown upon the education of their wards, had antiently a great influence upon many of the subjects, towards keeping down the spirit of liberty: moreover, there was formerly some principles very much received, and as it were rooted in the minds of a great part of the nation, which, in no small degree, checked and tempered the workings of this spirit. Men were brought up with a notion of the sacred hereditary right of

of our kings, and of the unlawfulness of resisting their authority, upon any pretence or cause whatsoever.

THESE principles, in the reign of James I, and some of his successors, were instilled into a great part of the people, in their education; and sinking into their minds as undoubted truths, had, though they could not command some, yet a great influence on the conduct of others, and those in great numbers, as well as some of great weight. But, since the Revolution, the vast number of pamphlets written and dispersed through all parts of the nation, and read even by the lowest of the people, and countenanced by the highest, have not only much lessened the influence of these principles, but almost wholly extirpated them out of men's minds. The people have been taught and persuaded to believe, that the laws and liberties of this kingdom are their birthright. The notions of the universities and the clergy are a good deal changed; and the freedom of the press gives every man opportunity of imparting his thoughts upon this subject to the public.

Now when such a spirit of liberty is diffused through the mass of a nation, especially of one already possessed of laws that fence every great article of liberty, it appears to be impossible that a crown, in the circumstances of our's, should suddenly, or in any little time hereafter, become absolute, without the assistance of foreign force. But if any person thinks, that by the influence of perferments, the operation of civil officers, and the application of money, the crown may gain parliaments, to such a degree, that they may gain whatever points they desire, not apparently contrary to the national interest, I will not dispute this point with him. The only points that I would insist upon are these: viz.

1st, That the crown will not be likely to get any parliament to give up any of the great bulwarks of national liberty: though, even if the parliament should do that, like the parliament summoned by Richard II at Shrewsbury, yet the crown would not, in consequence of the parliament's so doing, have its own absolute power effectually established.

2^{dly}, No parliament will, I believe, be so far influenced as to give up any of the essential points, or great securities of our liberty; because

because the parliament is now composed of gentlemen of estates, who could not easily have any equivalent for what they or their posterity would suffer by the loss of public liberty. There are not places enough of value, in the disposal of the crown, to tempt a sufficient number of them, nor could the crown well find money enough to make it worth their while; for it would be selling their birth right for a mess of pottage.

3dly, THEY would recoil at the thoughts of so deeply injuring their posterity and their countrymen; even if they could do it with safety. But, moreover, they would not only fear to be reproached and laid aside, for the future, by the people, but might also expect that such laws against the plain interest of the people, would not be submitted to. The nation are now generally come to look upon the house of commons as empowered to act for the benefit, but not for the ruine or great mischief, of their constituents; and, therefore, if they should act plainly to the public mischief, they would reckon their actings illegal, and even null in themselves. Their authority would be lost: they would be only considered as five or six hundred men, and even the most profligate of men. The Senate of Capua was so; and so was the Cortes, at the Groyne, in Charles the Fifth's time: and thus was our Rump parliament. The nation would think themselves at liberty to disavow what they had done, and would certainly chuse persons who would resolve to retrieve and annul it; and would probably refuse to submit.

HENCE, therefore, a parliament will hardly venture to act openly and avowedly against the interest and liberty of the people. And the interest of the nation is now so well understood, that the parliament cannot think of imposing upon it, in any thing which is much against the public service. Formerly, this might be somewhat more practicable; before printing was found out, or when nothing of state matters could be printed, but what was licensed by the government: but now any person is at liberty to print what he thinks fit, so he observes proper decency and caution.

PERHAPS it will be said, that the crown has a very considerable body of standing troops, sufficient to intimidate the people, and prevent

prevent any insurrection or actings, on their part, in opposition to what the parliament shall do, and that this body of troops might easily be augmented. I grant they may; but, if they should be augmented, they would hardly be sufficient to make the crown absolute, because they would not stand by it: indeed the Lord Clifford, in Charles the Second's time, told a person of quality, in private discourse, that the king, if he would be firm to himself, might settle what religion he pleased in this kingdom; and carry the government to what height he would. For if men were but assured in the liberty of their consciences, and undisturbed in their properties; and able and upright judges made in Westminster-hall: and if, on the other hand, the fort of Tilbury was finished to bridle the city, the fort of Plymouth to secure the west, and arms for 20,000 men in each of these, and in Hull for the northern parts; with some addition, which might be easily and undiscernedly made, to the forces on foot; there were none who would have either will, opportunity, or power to resist [a].

SIR William Temple, on the other hand, who was a very good statesman, and a good friend both to the crown and to his country, was of a different opinion. "I shewed," says he, in his Memoirs, "how difficult it was, if not impossible, to set up here the same religion or government that was in France: that many who were perhaps indifferent enough in matters of religion, considered it could not be changed here but by an army; and that the same force that made the king master of their religion, made him master of their liberties and fortunes too. That the kings of England have no means to raise or keep armies on foot, but by supplies from their parliament, nor revenues to maintain foreign wars by other ways. That if they had an army on foot, yet, if it was composed of English, they would never serve ends that the people hated or feared. That the force seeming necessary to subdue the liberties and spirits of this nation, could not be esteemed less than an army of 60,000 men: since the Romans were forced to keep twelve legions for that purpose; the Nor-

[a] Rapin, vol. ii. p. 662.

"mans to institute 60,215 knights-fees; and Cromwell left an
"army of near 80,000 men."

A LATER author, of good skill in such matters, says he does not imagine that an army will be employed by these men (*i. e.* corrupt ministers of the crown) directly, and at first, against the nation and national liberty. I am far from thinking that any men can arise, in future times, capable of attempting in this manner, what some men, in our age, who call themselves friends to the government, have been so weak and so impudent as to aver in print and publish to the nation. To destroy British liberties with an army of Britons is not so sure a measure as some people may believe [*b*]. And the same author, in another place, says, it will appear, upon due consideration, that our liberty cannot be taken away, unless the people themselves are accomplices [*c*]. If this should happen to be our unfortunate condition, the people, in general, will, most certainly, make a struggle for the preservation of our antient constitution. This will undoubtedly be the case; and when it is, I hope those who shall bring us under such afflictive circumstances will find, that even an army of 60,000 men will not be able to stand against the whole people of England.

4^{thly}, THERE is no appearance that the standing troops, composed as they are, and will always be, of officers and soldiers of our own nation, would all stand by the crown in attempts to destroy the constitution. The officers being, many of them, men of property and honour, would not care to lose their liberties: and the soldiers, by often mixing with the bulk of the people, would take sentiments and impressions from them. Tarquin the Proud left an example to all future tyrants, that an army of freeholders will always turn their swords against their oppressors, whenever an opportunity presents itself. The decemvirs of Rome experienced this; their army turned against them. They were at first restrained by their military oath; but they got above that scruple, by considering, that the decemvirate was then an usurped illegal power. There were some that remained with the decemvirs;

[*b*] Dissert. on Parties, p. 116. [*c*] Ibid. p. 145.

but the greatest part of the army took up their ensigns, marched to Rome, and concurred with the people in abolishing the decemvirate [d]. This was the case in King Charles the First's army, when marching against the Scots, in 1640. Nothing could alter the opinion and humours of the officers and private soldiers of his majesty's army; who, in their march, did not spare to give their judgments against this war, particularly that they would not fight to maintain the power and pride of the bishops [e].

LUDLOW, in his Memoirs, tells us, that the parliament army, in the latter part of Charles the First's time, would not be employed in levying illegal taxes upon the people, though the money was for their own pay. And the like disposition appeared in the army in King James the Second's time. Religion, indeed, was then concerned in the question; but if it had not, yet attempts upon civil liberty only would probably have had a like influence upon them; and so it would upon our army now. And I make no doubt but that the gentlemen of the army would behave as their predecessors did at the Revolution; and that most of them would soon be found on the people's side of the question.

THESE are considerations too evident to escape the discernment of the crown and its ministers: and on that account one may well conclude that there will be no attempts of this kind made while the nation is in this disposition. If a political prince should ever have such a design, he will, no doubt, think it necessary, first, to damp, or extinguish, as far as possible, this spirit of liberty, in the bulk of the nation. But this work would be very difficult to be accomplished, if it could be done at all, without a great deal of time, or very violent methods. Some think it may be done, by introducing luxury, and, in consequence of it, corruption; for it was so at Rome about the end of their commonwealth: they say, the wealth brought by the great men from Asia, Gaul, &c. was made use of, by them, to bribe the people, and make them give up their liberties. Now it is certain that corruption had no small share in this effect; but they who make the ruin of that

[d] Dionys. Hal. lib. xi. p. 722, 723.

[e] Echard's Hist. vol. ii. p. 175.

commonwealth wholly owing to corruption, do not seem to understand the true state of it: there were other causes, as well as that, which contributed to its ruin. There had been always two opposite parties; the nobles, and the people. The latter was, in itself, much inclined to Cæsar. There had been precedents, in favour of Pompey and others, of dispensing with the laws: and, by these, Cæsar obtained so long a command in Gaul, that he got a very great interest in his soldiers: and his victories, rather than the will of the people, ruined the commonwealth.

BUT here in England there is no apparent probability of any thing like this. The crown is not likely to be possessed of any such wealth, or such opportunities of making a body of troops be so attached to itself. And, without any prospect of success, it will hardly attempt to corrupt the mass of the people, or the army. As to the former, it could never succeed; it would only exasperate those who were not gained, and make those unfaithful that were. And if the nation saw that there were applications of that sort made to the army, with any prospect of success, they would soon make application to parliament to have them disbanded. From all these considerations laid together, I take it to be impracticable for the crown of this nation, at least in a long tract of time, to subvert our liberties: and, for this reason, I persuade myself that it will not be attempted. I really believe, the crown will not be disposed to do more than to conserve the prerogatives it has at present, or obtain such points as it may gain without giving much umbrage to the people: especially as there are those, on the other side of the water, that would sufficiently improve, to their advantage, any false steps that should be made of that nature.

BUT, on the other hand, some people are much in doubt, whether the crown will be able to do so much as this. They are full of the apprehensions, as I have already observed, that the republican spirit will by degrees prevail against the prerogatives of the crown, till at length it will be brought down to be almost only nominal, or perhaps quite laid aside. And they pretend to have surer grounds for this opinion than are usually to be had in political matters. They observe, that the ablest writers of politics have

have thought it demonstrable, that, whenever the balance of property is on the side of the people against the crown, a government must then sink by degrees, from a monarchy to a democracy. They observe that this was actually the case in most, if not all the trading cities of antiquity: though they were monarchies at first, yet the people continually gained upon them, till they had established the democratical form of government. The balance of property, in England, is now considerably on the side of the people: and the commonalty, in this nation, have been gaining ground these two hundred years. There is a great change for the advantage and power of the cities and towns in the article of taxes: antiently, the cities and towns, when taxes were granted, usually, if not always, gave one third more than the nobility and country gentry; at present, many of the inhabitants of towns are charged hardly any thing to the land-tax; and even cheat the crown in the customs, &c. while the gentry are under the burden not only of the land-tax, but pay the chief weight of the customs.

THEY farther observe, that it is of great weight towards carrying us into a republic, that the city of London, which generally has been, and will be, against the court, and will incline naturally to a republic, has a vast influence upon the rest of the kingdom, by its trade and correspondence, and that it must propagate such republican principles amongst the gentry, by its mercantile families purchasing great estates, and yet retaining their old popular principles and inclinations, as will greatly incline the country gentlemen to be of the same principles. That the three great trading companies, though they may be, at some particular times, in the interest of government, or an administration, yet are in themselves, and in the natural course of things, independent bodies of great power and interest, and naturally inclined to the republican spirit. That the people are so fenced with laws that the crown can do nothing against them. That they can chuse a parliament at any time which may grievously hamper the crown; and, by denying the necessary yearly supplies for the service of the government, can oblige it to pass what bills they please. That

at the beginning of any reign, the parliament can either lessen the civil list, or grant it only for a time, and so make the crown quite dependent. Persons of eminence among the whigs have declared it as their sense, that this ought to be done: that the general body of the dissenters from the church of England have been always inclinable to these republican notions, and have made them greatly increase and spread through the kingdom; so that it is not improbable but that, if discontents with the conduct of the crown should run very high, the malcontents may chuse a house of commons to their own humour; and then the other points would be, without much difficulty, carried against the crown.

THIS has been the language of many of our tory politicians; and I cannot but acknowledge that there is considerable weight in these considerations: but not quite so much as these gentlemen imagine. For, first, "*potestas radicatur in voluntatibus hominum.*" And though, indeed, where property is, there will be always great means of gaining and securing these voluntates; yet in some cases that circumstance may not be sufficient. It was not so, for instance, in Athens, in the time of Solon; nor in Rome, about Cicero's time; when it was said publicly, by the tribune Philippus, and not contradicted, that there were not, of all the citizens of Rome, above two thousand who had any considerable share of property. Perhaps this might not be exactly true; but it is certain that the property was then chiefly vested in the senators and some other few hands: yet, notwithstanding, it appeared in the event, that these masters of the property could not govern the rest of the people. These latter, on the contrary, were the instruments used to overturn the government, and ruin those in whose hands the property was. The common people, among the Switzers, rose against the nobility, and banished them all, A. D. 1260 [f].

THESE, and many other instances that might be produced, are of force to shew that the voluntates of a nation may not always be carried to that side where there is an over-balance of property; and there is reason to hope that they will not be so in this nation;

[f] See Puffendorf, Introduct. 404.

because

because men will generally be for their real interest, if they know it. And it is really the interest of this nation to preserve the present constitution as it is, rather than to change it for such republican visionary schemes of government, either aristocratical or democratical, as some people would be for introducing; since these would be very likely, if not certain, in the end, to throw things into confusion, or pave the way for the pretender. For these reasons I think it morally certain, that the republican scheme will never be embraced, by any number of the nobility, or the antient gentry of landed estates: perhaps some of these may so far misjudge of the interest of their order as to give in, at first, with such schemes; but they will hardly continue to do so long. The greatest part of them will always stand by the crown, with which their own interest and privileges are, in a great measure, bound up. These privileges are already fallen to a prodigious degree from what they were. There have been times when they governed all the countries round them, and were treated with the utmost respect by the gentry, much more by the common people. At present they have very little influence, and as little regard paid to them; and they must grow still much lower, as their estates decline, and their interests in the nation with them, unless they support the crown, and are supported by it.

THE case will be the same with the greater part of the established clergy; whose education and principles, as well as their interest, will always dispose them to be for the crown, if they are tolerably well used by it. Because they must know that a republic will always infer a parity of preferment, or somewhat near it; and that most of those who are for such republican notions are professed adversaries to the clergy. They will, therefore, stick close to the crown, and will endeavour to gain the people to their side: and generally they will be able to effect it; because the people of this nation have, for the most part, a strong prejudice in favour of monarchical government, under which their ancestors have lived: and been happy for so many ages. Now the power the crown has by the constitution, with the support of the nobility, the gentry, and:

and clergy, it may be hoped, will be always sufficient to support it against any attempts of the republicans.

BUT perhaps it may be said, that, however the civil constitution might be likely to be maintained among ourselves, if all were well affected to it, yet the case may be very different in the present disposition of the nation. There are very great numbers of the people disaffected to the present royal family, and greatly attached to the abdicated one. This spirit, which has always remained in the nation since the Revolution in 1688, does not seem to decrease; and if it should be fomented and supported, as it is likely to be, by France, it may be attended with dangerous consequences: and still more so if a foreign force should be poured in upon us at the same time; by which many other nations have had their constitutions ruined; and may we not be surprized by a foreign power as well as other nations, especially when we are at variance among ourselves? Without doubt we may, notwithstanding the advantage of our insular situation: we have already suffered by this means, and may so again. Though Spain, the most formidable enemy this nation formerly had, be now so much reduced, that we need have no fear from that quarter; yet there is another very formidable power, I mean France, still remaining. That kingdom has a very great union within itself, and the people have a great reverence for their king. They have great materials for trade, and therefore are sure of great wealth, which the king can command in what proportions he pleases. The noblesse, who have most of them commands in the army, are fond of war; and would be so particularly of a war against England, to which they have an inveterate national animosity.

AND farther, besides the advantages that kingdom has within itself, they have at present other great ones from without. The house of Austria, which is the natural balance against France, is rendered much less powerful in the empire, by the growth of power in Prussia. But what is still more in her favour, Spain is in the hands of a prince of the royal blood of France, and is therefore likely to act in concert with her, by giving her advantage in commerce, and by arming in conjunction with her against the house of Austria, their common enemy. This was formerly the

case with the two branches of the house of Austria, when the one of them had the empire, and the other had Spain; the latter, by Spinola, drove the king of Bohemia out of the Palatinate in favour of the other. And this may be the more likely to be the case between the two branches of the house of Bourbon, because Spain has views of making great establishments in Italy; in order to which France may be of great service to her, by giving diversion to the forces of the house of Austria. Spain has also, most undoubtedly, views upon Portugal, in which France may help her; and so engage her to the like good offices. Now, if France and Spain join heartily together, what power will be able to resist them? Having all the wealth of the Indies at their disposal, will they not soon bring Holland into their dependance? And will they not by this means, not only engross the greatest part of the trade of Europe, but also greatly increase their naval power? Will not this enable them to be our superiors at sea? And must we not then lie wholly exposed to them?

In answer to these questions, I do acknowledge, that some of the circumstances here mentioned may justly render the house of Bourbon formidable to the rest of Europe, and may probably inspire the French with those views of universal monarchy, in this age, which Spain appears to have had about two ages ago. The bishop of Nismes, in a speech made to the king of France, 17th of September, 1730, when the assembly of the clergy took leave of his majesty, said, "That the happy fruitfulness of the queen confirms more and more the tranquillity of Europe, and prepares, in your blood, immortal supports for the church, and perhaps sovereigns for the universe."

BUT there is great reason to hope, that others of these circumstances, in favour of France, will not hold good, but that there will be always some power in Europe to keep her at a bay. For, in the first place, there is reason to hope, that the union and concert between France and Spain will not long subsist: although there be a prince of the blood of France upon the throne of Spain, yet the geniuses of the two nations differ very widely, and will still continue to do so. And as it is the true natural interest of Spain to
continue

continue independent of France, so it is to be hoped that the grandees of that kingdom, and even the people in general will see it; and at the same time will see that France may easily grow too powerful for them. When a branch of the house of Austria was on the throne of Spain, there was no room for this jealousy, with regard to the other branch on the Imperial throne. But there may be always room for the Spaniards to fear, that, if France grows too powerful, she may have designs upon Spain, which it would be visibly her interest in several respects to pursue: and Spain might be thereby reduced to be a province of France. And if so, then it must be the true politique of Spain, not to encourage, or even permit, the too great growth of France; especially not to let it over-run Holland, but rather to join with the confederates, in making an opposition to it. This Spain did formerly: and when the force of consanguinity decays, as it will soon do, between the royal families of France and Spain, then the natural interests of their kingdoms will take place, and make both those courts act according to them.

As to the empire, no doubt can be made but that the electors and other princes of it will have so much regard to their own interest, as to support an interest in the house of Austria, by uniting its hereditary dominions in some one person to the Imperial power; which union is the only apparent means of defending them against the power of France on one side, and against the Turks on the other. As that kingdom has pretensions upon the empire, and upon the dominions of several princes in it, ever since the time of Charlemain, it sure cannot be the interest of those princes to chuse any one emperor who is at all attached to that crown. We may be certain, that, if there be no force upon them, they will never do it. France indeed may influence the electors upon the Rhine; but the others will never come into these measures. It may be hoped then that the Empire, Great-Britain, Spain, Holland, and Savoy, will be always able in confederacy to be more than a balance for the power of France. I am well aware, indeed, how hard it is to form confederacies, or to make them act effectually together: a kingdom of great force, united in itself, will always

ways have vast advantages against them. And I am farther aware, that if God should see fit to take away the lives of the present king of France, the Dauphin, and his children, the people of that kingdom would, in all appearance, call the king of Spain, or the eldest infant of that kingdom, who would be nearest in blood, to the throne of France; so that, in that case, the kingdoms would certainly come to be united: it is the interest of the people of France to do it. And besides they are so greatly attached to make their crown descend according to proximity of blood, that they would certainly do it. And in that case, I do think indeed that we, as well as the rest of Europe, would be in great danger. For France and Spain would engross most of the trade and wealth of Europe; and from thence would be able to command at sea, and consequently might invade us whenever they would, with great prospect of success. For this island, having no strong places, and having London, its great seat of wealth, unfortified, would certainly be in danger of an invasion, in case we should lose the superiority of the sea: hence therefore will appear the great advantage of having a national militia.

BUT at present we are tolerably well secured against the fear of seeing France and Spain under one prince. The king of France is a good life; the Dauphin is likely to live to a good age, and has a numerous issue; and therefore we have no great reason to apprehend being subdued, by any efforts the former alone, or any other power now in Europe, can make. If we manage our national strength rightly, and make a proper use of the advantage of our situation; and keep our trade, and consequently our naval force, we shall always be able to have a fleet equal at least to any that France can put to sea. We may put our militia upon such a foot as to oppose any foreign army: besides, it is almost impossible for them to transport a body of troops sufficient to make a conquest of this island, if united in ourselves; even the Spanish Armada would not have done it. The fear of being unable to supply or recruit their troops, even when they are here, will hinder the French from attempting it, unless they are first absolute masters of the sea.

HONORIUS, who wrote in Queen Elizabeth's time, and was a great friend to the crown of Spain, says of England, that "*regnum illud Angliæ validum adeo remansit adhuc ut nullius egeat ad sui tutelam: quinimo non modo difficile et arduum, sed etiam penitus impossibile est, nisi regnum illud dissidia nutriet vi, illud expugnare[g].*" And the duke of Rohan, speaking of England, said, "*Angleterre est un grand animal, qui ne peut mourir, s'il ne se tue lui-même.*" France, therefore, will hardly ever be disposed to attempt an invasion upon Great-Britain, unless she sees us greatly and violently divided among ourselves. If we can but preserve a due union of hearts and affections among our countrymen, in defence of our constitution, and of this establishment, we may hope it may be secure from any thing that foreign force can do against it.

BUT, it may be asked, Are we likely to preserve peace long among ourselves? have we not had intestine wars and commotions almost once in every century since the Norman conquest? have not these produced national Revolutions, with the assistance but of a small body of foreign forces? and may we not fear the like may be done again, from the dispositions of the parties among us who succeed to those formerly? To these questions I answer, first, that it was much easier formerly, than it is at present, to make revolutions. There were then a great number of peers, of very large estates and interest, whose tenants were strongly attached to them, both by law and by advantage, and who, by means of these tenants, could soon raise and arm a formidable body of men; and so could make a stand till they could be assisted by foreign troops. By such persons the commotions were made here for two or three centuries after the conquest, and sometimes carried on to Revolutions. But even then, this could not be done without their taking advantage of great national grievances, in King John's time, in Edward the Second's, in Richard the Second's, and in Richard the Third's time: and if we come down lower to Charles I and James the Second's reigns, we all know that the grievances, in the former part of the first of these reigns, were very great; and that those in his son James the Second's reign were yet much more so.

[g] Ph. Hon. De Regn. Britan. p. 199.

THE only prince in England dethroned without much fault in himſelf was Henry VI; he was a pious and well meaning prince, and not inclined to aggrieve his people in any reſpect. But then he was alſo a very weak prince; and was in the hands of his miniſters, who were both very ill managers and very unſucceſſful; and who loſt the honour of the nation. He was yet more governed by his queen, a haughty imperious woman of the houſe of France, who practiſed great violences, in ſeveral reſpects, eſpecially againſt the duke of Gloceſter, whom ſhe cauſed to be murdered. Theſe violences, and the great ill ſucceſs of this reign, ſet the people againſt the king: and beſides he had the diſadvantage of having a prince in his family, I mean the duke of York, who had the true hereditary right; who was a prince of great ſpirit, and other great abilities; and who had a large party of the people and ſeveral noblemen, of great power, on his ſide.

AT preſent the condition of this nation is very different in moſt of theſe circumſtances. We have but few noblemen capable of raiſing many forces: their intereſt in their tenants at rack rent is very ſmall; and at preſent the power of the laws is ſo great and equal, that they cannot do any thing againſt them by violence; ſo that they have not much influence upon them from fear any more than love. Nor are we likely to have any great grievances put upon the nation, on the part of the crown. For as to its enterprizing upon the civil liberties of the people, I have ſhewn that ſuch a thing is not likely to be done: and yet leſs likely is it that it ſhould be diſpoſed to do it in religious matters. Neither the king nor any of his family are of ſuch a temper that they are likely to break in upon the toleration: they will allow, in all appearance, a full religious liberty to all the ſectaries, to worſhip God in their own way. And it is ſtill leſs likely that they will break in upon the eccleſiaſtical eſtabliſhment of this nation, or hurt the intereſts of the church of England; becauſe it is viſible that no eſtabliſhment could well be formed more proper to ſupport, and promote, the intereſts of the crown, than the preſent one is.

THERE is ſome reaſon to judge, that moſt of thoſe who are againſt the hierarchy are alſo republicans in their hearts; and that

this part of the constitution can never be violated without raising discontents in a great part of the nation. For these reasons, though some people may be for advising attacks upon the church, yet it is not probable that the crown will go in with them, or in any degree encourage them. For the whole interest of the sectaries is not considerable, when put in opposition to the church of England. They are, indeed, so far considerable as that, when they are all joined together, they may endanger the church of England; and, as they would certainly join together, upon any opportunity to that purpose, it is therefore highly necessary that they should be guarded against, and such an union prevented. But they could not be a bottom for the crown to depend upon in any measure; because they never could unite in any scheme to support a ministry, or the interest of the crown, as they themselves have different interests: this is evident from their behaviour in Oliver Cromwell's, and his son's time. It is true, that, by this union with each other, they have a great weight in elections for members of parliament, and this has engaged ministers of state so far in their behalf, on some occasions: especially the Quakers, who have gained some points, and increased, by this means. But this will engage all able ministers to have a more watchful eye over them for the future, because their maxims are all republican. And if the crown does not encourage them, but rather makes it a maxim to promote only persons well affected to the church establishment; and, at the same time, lets the sectaries alone in peace; they will, by degrees, fall away of themselves: and, since their differences are trifles, our posterity, it is to be hoped, will come to an uniformity in religion.

Now attempts upon either religious or civil liberties are almost the only things, by which the subjects of this nation will be so much discontented, as to be from thence disposed to act against the present establishment. Ill success in war abroad, or great decay in the wealth of the nation at home, may, indeed in some circumstances must, disturb the nation. For our people, who have been generally used to prosperous fortune in war, would be too apt to lay the fault of the contrary upon their princes: and thereupon

be full of resentment, if there was any gross misconduct in the prince on the throne, or in his ministers. And they would perhaps be in the like disposition, if trade was to decay very greatly; and that they could lay it remarkably to want of good management, or to design, in the crown. But this latter case is not likely ever to happen, at least not for any long time together: for the crown will hardly ever endeavour to hinder trade, but rather to promote it; because, even with regard to the produce of the customs applied to the civil list, it is its interest so to do, as well as to make the people easy in their fortunes. The only thing that can be imagined to put the crown upon measures that will hurt trade, will be, if there should be a ministry that, conscious to themselves of their having lost the interest of the people, and that, unsupported by any persons of ability to manage in times of distress, should therefore be afraid of a war, and should accordingly submit to any measures to keep it off: and, by this means, be forced to overlook any depredations upon our trade, though accompanied with the most outrageous insolence. If this should at any time happen, probably the trading interest, and the bulk of the people, would express a proper resentment. And if ill success should happen in such a war they would impute it to the crown: but otherwise if ill success should happen in a just war, without any fault of the prince, it would not be very difficult to make the people easy; at least by sacrificing a minister, or general, grown unpopular.

THE only thing that would, with any probability, have much effect towards the subversion of the present establishment, would be, if any of our kings should so far profess to attach himself to a small number of his subjects, as to not only neglect the rest, but exclude them from all hopes of ever enjoying his favour. As, by being considered as his enemies, it might make many of them become so in good earnest; and, if they were popular, they might gain such an interest among the people as to be able to raise great disturbances. But there is no appearance that this will ever happen to the present family, who are of good judgment, and have all had opportunities enough of knowing the genius of the nation:
and

and unless a king was to do it very remarkably indeed, the heads of such a party will hardly be induced to carry things to extremities. Their regard to their interest in the funds, and to their religion and liberty, would make them bear a long time, and endeavour to gain a king's good graces; and when a prince sees them supported by the majority of the nation, he will endeavour to bring things to an accommodation. Upon the whole, therefore, though there may be contests about the means and persons fit to serve the public, it is reasonable to think they will hardly go so high as to destroy the constitution.

THE fear of losing the abbey lands would also be a great inducement to the persons concerned in them, to stand by the present establishment. Indeed, in James the Second's reign, there was a treatise published by Doctor Johnston, to make the present possessors believe that they should be secured in the possession of them, even though popery should come in. But Bishop Burnet, and some other authors, have given reasons to think that this was not designed to be the case. It is true, the pope, in the reign of Mary I, did by his bull allow the possessors of the abbey lands to keep them; but any other pope may rescind his predecessors acts, as they have frequently done, and may lay claim to those lands, if he thinks that there is a favourable opportunity for making good his claim. So that there may be reasonable grounds to hope that our present establishment may be of long continuance.

S E C T. III.

Of the Means to guard against these Dangers: (viz.) 1st, By Frugality; 2dly, By a due Respect to the Laws and Magistrates; and 3dly, By a hearty Concern for, and public practice of Religion.

CONSIDERING that there are circumstances, both from without, and from within, of no small weight against our present establishment, it is certainly very desirable and reasonable that all due and practicable measures should be taken to ward against

against dangers of every kind, at least those of the greatest moment, that may be incident to it. And to this purpose, it will be highly expedient that endeavours should be used to introduce, as far as may be, among the mass of the people, 1st, A more frugal way of living; 2^{dly}, A due respect to the laws and magistrates; 3^{dly}, A hearty concern for, and public practice of religion.

THE first thing that ought to be introduced, as much as possible, into the mass of the people, is a frugal way of living, within their income, whatever it be. National frugality is the best support to a state: for "*vestigal optimum est parsimonia.*" It will make people pay chearfully to the public charges; whereas, when they live beyond their income, they must be grievously pinched with them, and will always be disposed to murmur at these public taxes. And when their luxury &c. has deeply encumbered them, and almost consumed their fortunes, they will be always apt to be discontented with the present state of affairs, and ready to engage in any designs to raise commotions. This the Romans found by experience, in the decline of their commonwealth: they had been antiently careful to prevent too great expence, by sumptuary laws, about eating, equipage, and many other things. But when those laws were repealed, and luxury increasing without controule, and the fortunes of many of their citizens came to be ruined, they soon were disposed to make an attempt, upon the liberties of their country, in order to mend their private circumstances; this was the case of Catiline's conspirators, and of the civil wars.

IN England, indeed, luxury never was at so great a height formerly, or at least, if it was great among the people of quality, it was never so generally spread among the people as to give ground for much apprehensions of this kind. Yet our ancestors thought it proper, by several laws, to prevent too great expence, in some points, especially in that of habits among the people. There were laws appointing what sort of cloths each rank of men might wear: and Queen Elizabeth made a strict law to prevent men's running in debt for some sort of cloths. And it was certainly a weakness in King James I to suffer them all to be repealed. If they had continued in force to this day, with proper emendations, and others

had been added to them, the nation would have been upon a much better foot than it is: we should not see worthless persons in laced habits and coaches and fix, while the antient gentry, by straining to do the same, ruin their fortunes. Perhaps it will be thought, that regulations of this sort must always be disadvantageous to trade: and it is true, they will be so to some branches of it; but then those branches of trade are disadvantageous to the nation, and tend to its impoverishment. Such a one is our trade with France and Flanders at present, in which the balance runs at least 1,000,000 *l.* per ann. against us. In general all trade is disadvantageous which has this circumstance of the balance against us: indeed it is wrong, that, even of the national product, people should spend so much as to exceed their incomes; for this must tend to impoverish the nobility and gentry. But perhaps it may be thought, that this will be of no ill consequence, because the wealth, while kept in the nation, will only change hands, and the public will not suffer. But this is a mistake; for families of antient extraction and quality, though they grow poor, will always preserve somewhat of their high spirit: they must live, in some degree, suitable to their birth and family, and if they cannot do it, will be apt to forward any disturbances, in which they may find their account. And, therefore, care ought to be taken to lessen the national consumption; and, by obliging men to make expence only suitable to their conditions, occasion their living within their fortunes.

If this regulation was carried into execution, it would also contribute to the second thing which I mentioned as necessary to preserve the tranquillity of our happy constitution; (*viz.*) to recover and preserve, among the mass of the people, a due regard for the laws and magistrates. This is one of the principal grounds of peace and happiness in a society. The antient politicians, therefore, applied themselves chiefly to cultivate it; and they succeeded wonderfully well. The Spartans and the Romans had the greatest reverence for their magistrates; which continued all the flourishing times of their republics: and soon after it was sunk, they declined. Among us things are certainly come to a very bad pass in

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this way: the reverence for the laws is in a great measure lost: the low people have no concern about the laws, if they can possibly evade them, especially in the practice of smuggling; and I am sorry to say, that they are too much countenanced in this practice by many of our nobility and gentry. The elections of members of parliament; the constant resort to London; and the talking so much of liberty, have made the low people run into all kinds of licentiousness and rudeness. Plato, *De Rep.* p. 722. speaks of some cities that may be so thirsty of liberty as to be drunk with it, when they have corrupt drawers that are orators. This, indeed, is much the case among us; and is certainly a circumstance from which no small evils may be apprehended. There have been times in this nation, and others, when the low people have risen upon the nobility and gentry: and as they have the strength, and in this nation are so well fenced with liberties, one does not know what this humour, if it increases in the nation, will produce. It is therefore of great importance to stop it as much as possible; and to recover a due respect for order, for persons of rank, and for the laws; which is the great foundation of all government; that so the low people may be governed by authority, or impressions of respect, which is the natural method, and that there may be no occasion for force to that purpose.

BUT 3^{dly}, It is also of the greatest moment to retrieve a concern for religion. This all the politicians of Greece and Rome have agreed to be highly necessary to the well-being of Societies; and, therefore, they not only endeavoured to encourage it, as much as they could, but would not suffer the sophists or players, or the like, by their disputes, to unsettle the minds of their people. Plato advises great care to be taken in this point; and when afterwards the Greeks gave more into sophistical learning, and the minds of the people came to be corrupted with irreligion, their practice came to be suitably bad. Polybius remarks this, and commends the Romans for their care in keeping up a spirit of religion, and shews the advantage they found from it: he also foretold the ill consequences that would arise from their neglect of it. These actually

happened not long after, as we find from Livy; and contributed greatly to the ruin of that state.

THE people of England were, in most of the former ages, distinguished for their regard to religion; but at present it must be owned with concern, that the case is sadly altered: hardly the appearances of it are preserved. The many infidel books that have been published of late, have almost quite destroyed it, as it happened among the Greeks: and the consequence is, that even morality is gone with it: this must render the people harder to be governed; and it must especially make them sit loose to the protestant religion, which is the great ground and security to this establishment. It is without doubt therefore of great importance, that this matter should be taken care of; and, as far as possible, a spirit and practice of religion should be revived.

BUT how will this, or the other things here mentioned, be effected? Indeed, I fear, not easily or soon. Yet certainly some methods may be found that will be of service: and one would hope that the wisdom of our legislature, who are the most proper for that purpose, will turn their thoughts upon them. In the mean time I will venture to say, that there is one method which would be the most effectual of all others, and that is the example of persons of quality. Tully observes how effectual this is; and indeed the Roman state, among others, had a remarkable instance of it: from a rough and barbarous kind of people, a sort of banditti, as they were at first, they soon became greatly public-spirited, self-denying, &c. How was this change wrought? was it by the poverty, roughness, or simplicity of those times? No: other nations have been as rough, and have had as little wealth, and yet have not had so much public spirit. The true cause was the example of some few great men, as Tully and Sallust observe: and the like effects, though not in so eminent a degree, have been wrought in some other states. I will not affirm, that, in the present age and in our nation, the examples of people of quality would have quite so great an effect; but it would, undoubtedly, have a very considerable

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one. If a small number of persons of rank and estates would but, for instance, appear at church constantly, with an air of seriousness; and would, in their public conversation, express some belief and concern for the truths of religion, &c. the middle and lower people would soon follow them; the infidels would be out of countenance; and their tracts be despised. In like manner, if they would endeavour to discountenance licentiousness; shew a regard to the laws, &c. they would soon be followed by others. By practising self-denial and public conduct, they might diffuse the same kind of spirit all round them; as the senators of Rome did when they contributed to the Punic war: especially, if they would take care to give a good education to their children, and make early impressions on their minds, with regard to these and other points. But, it may be asked, Is it likely, that these examples will be given by the people of quality in such numbers as will be any way effectual? To this I can only say, that I know some, of whom there may be some hopes of this kind; and that all in general have more inducement to do it, than they have had perhaps in any other nation, or among ourselves in any other age: for the chief inducements to such conduct have been either the desire of preserving good politics to their descendants, the views of applause here, or the hope of rewards hereafter.

Now as to the first of these, I have shewn that hardly ever any equalled, and none exceeded ours: and if the nobility have any regard for their families, they ought to be most particularly concerned to take this method for preserving the establishment; for, if it comes to fail, it will probably first fail in that part which regards the nobility.

As to the second inducement, they may not perhaps, in this age and nation, meet with so much applause, as they might in some others formerly: but still there never will be wanting a great degree of applause to be given to good and public-spirited actions.

As to the last inducement, viz. the hopes of reward in another life, our nobility have certainly more reasons to expect it than any of the heathens ever had; whose views of this kind were so uncertain, that, though Tully represents Scipio as being much

moved by them, yet, at some other times, he speaks, as Plato had done before him, with a great deal of diffidence. And neither Demosthenes, nor any of the great Athenian orators, do at all mention them in those harangues they made to encourage public spirit, &c.

WITH us at present that matter is sufficiently clear and certain: we know that all sorts of virtue, and therefore, no doubt, public spirit, which is the highest of the social ones, will meet with a great and eternal reward, if a bar is not put to it by other vices that accompany it. If a man is at once a good patriot and a good Christian, he may justly hope for an eternal reward.

F I N I S.

